Tax Chamber
First-tier Tribunal for Scotland

[2021] FTSTC 3

Ref: FTS/TC/AP/18/0011

Landfill Tax Scotland Act 2014 - mirrors provisions in Finance Act 2014 - Court of Appeal in Devon considered - disposal of material as waste in cell walls and restoration - whether disposed "with the intention of discarding it"- yes - in roads – no - omission in records - whether prescribed activity – yes - whether qualifying material – no – penalties - Supreme Court in Tooth considered

DECISION NOTICE

IN THE CASE OF

Barr Environmental Limited

Appellant

- and -

Revenue Scotland

Respondent

TRIBUNAL:

CHAMBER PRESIDENT ANNE SCOTT
MEMBER: KENNETH CAMPBELL, QC

Sitting in public at George House, Edinburgh on 16-19 December 2019, 24-28 February 2020 and 2-5 March 2020

Written Submissions dated 7 June 2021 from both parties

Julian Ghosh QC, Jonathan Bremner QC and Laura Ruxandu of Counsel instructed by Brodies LLP, for the Appellant

Andrew Young QC, instructed by Revenue Scotland, for the Respondent

Format of Decision

Index and Glossary of abbreviations

GLOSSARY AND ABBREVIATIONS other than the law

CQA	Construction Quality Assurance
EPO	Environmental Protection Officer
EWC Code	European Waste Catalogue Code
IAs	Information Areas
LMPs	Landfill Management Plans
LS4	Landfill Skip System Variant 4
MRFs	Material recovery facilities
OCWs	Outer cell walls
NDAs	Non Disposal Areas
PCM	Processed Construction Material
PPC	Pollution Prevention and Control Permit
SEPA	Scottish Environment Protection Agency
SLfT	Scottish Landfill Tax
WTN	Waste Transfer Note

The law has not been included here since all relevant legislation is set out in full in the Appendix. All case law is given an abbreviation and citation within the body of decision.

DECISION

A. Introduction

(a) The Decisions under appeal

1. The Appellant ("Barr") appeals against decisions issued by the Respondent, Revenue Scotland, on 31 July 2018 as to the amount of Scottish Landfill Tax ("SLfT") which it is liable to pay and the related Notices of Assessment to penalties. Those decisions concluded the enquiries opened by Revenue Scotland on 30 September 2015 and 20 January 2016 in terms of Section 85 Revenue Scotland and Tax Powers Act 2014 ("RSTPA").

2. In summary, Revenue Scotland argue that substantial quantities of material that Barr say that they have used for engineering of outer cell walls ("OCWs"), permanent roads and for restoration at its two Scottish landfill sites at Auchencarroch and Garlaff (together "the Sites") amounts to a disposal of waste and therefore taxable. Barr argue that it is not taxable. There is a separate issue about whether waste known as filter cake is taxable at the standard or lower rate of SLfT.

3. Revenue Scotland's decisions (together the "Decisions") are contained in

(1) Revenue Scotland's Closure Notice in terms of Section 93 RSTPA dated 31 July 2018 which set out its conclusions to its enquiries into accounting periods 06/15 and 09/15, making amendments to Barr's returns for those accounting periods and issuing related assessments to penalties.

(2) Revenue Scotland's Notice of Assessment under Sections 98, 102 and 105 RSTPA dated 31 July 2018 in relation to accounting periods 12/15, 03/16, 06/16, 09/16 and 12/16.

(3) Revenue Scotland's Notice of Assessment under Section 98 RSTPA also dated 31 July 2018 in relation to accounting periods 12/15, 03/16, 06/16, 09/16, 12/16, 03/17, 06/17, 09/17, 12/17 and 03/18 which assessed Barr to additional SLfT and issued related assessments to penalties.

4. The total quantum of assessments and penalties is £99,642,808.

5. Revenue Scotland bear the burden of proof in regard to the Section 98 Assessments and the penalties.

6. Since the relevant legislation is extensive we have annexed at Appendix 1 the sections to which we have been referred or upon which we rely.

7. Our approach to the format of this decision is unconventional in that we have approached the key "topics" that we must consider with a mixture of fact finding and discussion. Whilst we would have preferred to have had discrete findings in fact and then drawn inferences from those, the context is, in almost all of it, crucial. Therefore the core findings in facts are combined with a narrative history.

(b) Post hearing submissions

8. In December 2019, for the first diet of the hearing, it was known that the First-tier Tribunal in *Devon Waste Management Ltd and Others v HMRC*[1] *(*"Devon 1"*)* had found against the taxpayers. By the time of the second diet, in the spring of 2020, it was known that the Upper Tribunal had reversed that decision ("Devon 2")[2]. On 22 April 2021, the Court of Appeal released their decision[3] ("Devon 3") reversing the Upper Tribunal's decision.

9. Furthermore, as there are penalties at issue in this appeal it was relevant that on 14 May 2021 the Supreme Court had issued a decision in *Revenue & Customs v Tooth*[4] dismissing the Revenue's appeal. In light of these decisions we invited, and received, submissions from the parties.

(c) Case Management Decisions

10. On 7 February 2020, the Tribunal received an application by Revenue Scotland for an Order in terms of Rule 5(3)(e) of the First-tier Tribunal for Scotland Tax Chamber (Procedure) Regulations 2017 ("the Rules") to permit them to lodge a supplementary witness statement from Mr Lang and a substantial number of exhibits thereto.

11. On 11 February 2020, the Tribunal received an application from Barr seeking an Order that the part of its appeal against the Section 98 assessments and the penalty assessments should be granted at this juncture without the need to hear further evidence and before the Tribunal considered submissions on the substantive issues.

12. Both applications were opposed.

13. On 14 February 2020, the Tribunal issued a Direction that the applications be dealt with as preliminary matters at the outset of the continued diet on 24 February 2020. They were and we heard argument.

14. The following day the number of exhibits having been culled to approximately 43 pages, Barr consented to the lodgement of the witness statement and those exhibits.

15. Mr Campbell then delivered our ruling on Barr's application. For the same reasons as we had refused a similar application in May 2019, we refused the application. This Tribunal exercises a full appellate jurisdiction and thus we are not merely reviewing the decision of Officer Hoey. Our decision has to be informed by consideration of all of the evidence, taken in the round and also with reference to the testimony of particular witnesses on specific issues. We took the view that that applied not only to the substantive issues but also to the Section 98 assessments and penalties. It was more appropriate to deal with the issue of whether or not there had been deliberate (or indeed careless) behaviour once all of the evidence had been heard and submissions were made.

[1] 2018 UKFTT 181 (TC)
[2] 2020 UKUT 1 (TCC)
[3] [2021] EWCA Civ 584
[4] 2021 UKSC 17

(d) The evidence

16. We had the benefit of a Statement of Agreed Facts, albeit it was very limited and for that reason it is not reproduced herein but rather has been integrated into our far more extensive findings in fact.

17. We had two Bundles of Authorities relating to the substantive issues, a Joint Bundle extending to 6,511 pages, a Supplementary Bundle with 12 topographical surveys, a Bundle of Revenue Scotland's SLfT Guidance, 806 pages of physical evidence given to Revenue Scotland on USB sticks on 13 October 2016 and 12 April 2017, the Application on penalties Bundle extending to 325 pages and an Authorities Bundle on penalties. We also had the benefit of a video, showing in schematic form the operation of a landfill site.

18. Both parties lodged Skeleton Arguments, Notes on the evidence and Closing Submissions.

19. We heard evidence for Barr from Mr Gavin Ramsey, the current Managing Director. He was the Technical Director from 2013 to April 2019 and was responsible for aspects relating to engineering which is at the heart of this appeal. We also heard from Ms Leanne Milligan, the Finance Director and Company Secretary.

20. For Revenue Scotland, we heard from Ms Anne Marie Hoey who is Revenue Scotland's Head of Complex Tax Enquiries, Messrs Edward Turner, Unit Manager, Fraser Allan, Intelligence Specialist, Peter Lang, National Waste Team Manager of the Scottish Environment Protection Agency ("SEPA") and Andrew Macartney, Statistician employed by Revenue Scotland and from HMRC Officers James Doolan, Tax Specialist, Steven Mitchell, Compliance Officer and Ivor Berry, Tax Specialist.

21. Both parties had expert witnesses who were present throughout the hearing. We had the expert reports of Mr Stephen Hodges for Barr (two reports) and Mr Brian McMeekin for Revenue Scotland and their Joint Expert Report. We have incorporated their findings in the Joint Expert Report in our findings in fact.

B. Overview of the background

22. From 1 April 2015, SLfT, a devolved tax, replaced the Landfill Tax regime in Finance Act 1996 ("FA 96"). It is not in dispute that Section 3 Landfill Tax (Scotland) Act 2014 ("LTSA") mirrors Section 40 FA 96 and Sections 4 and 5 LTSA mirror Sections 64 and 65 FA 96. That therefore makes the extensive jurisprudence on these legislative provisions directly applicable because the Explanatory Notes to RSTPA read:-

> "The effect of [the legislation] is that the jurisprudence concerning the proper bounds of the tax authority's role is imported into the devolved tax system. This jurisprudence includes not only case law from the UK jurisdictions but other English-speaking jurisdictions."

23. This is the first SLfT appeal to be heard by the Tribunal in Scotland, but it is very closely linked to an enquiry by HMRC which related to a decision about FA 1996 albeit the appeal relating to the decision thereon is sisted behind this appeal.

24. Landfill Tax in the UK changed radically following the decision in *Waste Recycling Group v HMRC*[5] ("WRG"). Prior to that decision all material brought on site was taxed even where it was used for on-site engineering. Parliament then enacted The Landfill Tax (Prescribed Landfill Site Activities) Order 2009 ("PAO 09") which brought specific re-use activities into the scope of the tax, whilst others were not taxable.

25. With effect from 1 September 2009, a duty to notify Information Areas ("IA"s) was introduced by HMRC in order to distinguish between the activities on a landfill site. The similar SLfT position is that landfill operators are required to record the non-taxable activities taking place on site in designated areas that are known as Non Disposal Areas ("NDAs").

26. In preparation for the first meeting with KPMG on 10 February 2009, Mr Ramsey had prepared a report for KPMG dated 26 November 2008 ("The Ramsey Report") quantifying a potential refund of tax and it recorded some of the activities undertaken on-site that might be impacted by the *WRG* case. The Executive Summary stated:

> "Historically, Barr…has utilised materials that would otherwise have been disposed of in landfill as part of the engineering works associated with landfill construction and development…To date, this material has incurred the full rate of applicable Landfill tax.…This report summarises the calculation of a …refund claim…valued at an estimated £2.4M."

In particular, it identified road building in active cells, cell construction and engineering on cell flanks.

27. KPMG were engaged by Barr in January 2009, initially to seek a refund of Landfill Tax following the decision in *WRG,* but their role expanded considerably thereafter. Barr have consistently argued that they acted at all times on KPMG's advice.

28. In 2010, the Scottish Government's Zero Waste Plan was published setting out plans for legislation to reduce the amount of waste going to landfill. Barr decided to invest in a Materials Recovery Facility ("MRF") in order to remain competitive and to retain local authority contracts in the face of more stringent policy and increasing landfill costs. We describe that in greater detail below but it is essentially a recycling and reprocessing centre.

29. Ms Milligan's witness statement describes Barr using their investment in the MRFs to promote their model to the local authorities. The first page of the January 2013 tender document for two Local Authorities, that we have seen, goes a great deal further than that. The key points made on that page include:

> (a) "We will save the Councils £10 million in avoided landfill tax charges over the course of the contract…",
>
> (b) That money would be saved by the "….diversion of waste from landfill and avoiding landfill tax", and

[5] [2008] EWCA Civ 849

(c) They would be "…diverting Biodegradeable Municipal Waste (BMW) and also increasing the levels of material recycling and recovery".

30. The following page of that tender describes how the initial investment in the MRF at Garlaff in June 2012 had achieved a "diversion of 15%" and that would increase to 30% in the first year of the contract.

31. It is that "diversion" that is at the heart of both Revenue Scotland's and HMRC's decisions.

32. In the Closure Notice dated 31 July 2018, Officer Hoey relied on a statement that in the period 1 April 2015 to 31 December 2017, Barr received a total of 835,839 tonnes of material at the Sites. It declared 76% as exempt from SLfT; 21.9% as subject to the standard rate of SLfT; and 1.98% as disposed of subject to the lower rate of SLfT. She then stated that Barr had claimed to have used 542,499 tonnes of material in engineering activities on the Sites. Clearly the arithmetic is not correct as was recognised by Revenue Scotland's Statement of Case which did not use those figures.

33. However, Barr's own figures produced by KPMG for HMRC at Appendix D of a report dated 27 November 2015 ("the November 2015 Report") give a very clear picture. Officer Doolan had asked for an analysis of a representative period of nine months from 1 February 2014 to 31 October 2014.

34. In that period 236,091 tonnes of waste was received on the Sites and 163,875 tonnes were diverted. That is, by any analysis, a large proportion. Of that diversion 94,589 tonnes was diverted at Auchencarroch and 69,286 tonnes at Garlaff. At Auchencarroch 60,073 tonnes was used for restoration and at Garlaff 43,810 tonnes. So a total of 103,883 was used for restoration. 19,500 tonnes was used for roads and 40,072 tonnes for OCWs. The OCWs were said to consist of Zone A which was one metre wide consisting of clay and Zone B which was 10 metres wide and consisted of a mixture of clay and processed waste (Zone C is the landfill waste). The balance of 420 tonnes was for gas drains which is uncontroversial.

35. Of the restoration tonnage 41,990 tonnes was Processed Construction Material ("PCM") which does not pass through the MRF. That amounted to 25.6% of the total and 40.4% of the restoration total. No PCM was received after October 2015.

36. There was no restoration anywhere after 2016 so although the amount of material diverted remained at a very high level it was used instead in roads and OCWs. That raised many questions for Revenue Scotland.

C. High level view of the Issues

37. There are four issues for decision by the Tribunal, namely:-

(a) Taxable disposals;
(b) Prescribed activities;
(c) Filter cake;
(d) Penalties.

The penalties, or not, flow from the decisions on the other issues.

(a) Taxable disposals

38. The issue was whether the use made of materials by Barr to:-

(a) construct OCWs,
(b) undertake certain restoration works, and
(c) construct certain roads

is, in each case, within the charge to SLfT, by reason of being a "taxable disposal" within Section 3 LTSA by reason of being a "disposal":

(1) of "material as waste" (Section 4 LTSA),
(2) "made by way of landfill" (Section 5 LTSA), and
(3) at a "landfill" site (Section 12 LTSA).

It is not in dispute that the conditions are cumulative and must be satisfied at the same time[6]. The substantive issue is whether or not the material was disposed of as waste, in other words, disposed of with the intention to discard it.

39. It was argued for Barr that because HMRC were pursuing only the issue of the construction of the OCWs that Revenue Scotland should adopt the same approach. Firstly, what HMRC chose to do under their care and management powers in terms of the Commissioners for Revenue and Customs Act 2005 would not in any way bind Revenue Scotland. Secondly, and more importantly, in a letter dated 30 June 2017, HMRC made it explicit that they were not then pursuing the matter of restoration but reserved the right to revisit it if new information was received. That was described in evidence as a pragmatic decision in the context of the transition to SLfT and we accept that.

(b) Prescribed activities

40. Even if there is no taxable disposal there is nevertheless a charge to SLfT if the provisions of Sections 6, 30 and 31 LTSA, Article 3 of the Scottish Landfill Tax (Prescribed Landfill Site Activities) Order 2014 ("the 2014 Order") and Regulation 12 of the Scottish Landfill Tax (Administration) Regulations 2015 ("the 2015 Regulations") apply.

41. In relation to the OCWs, an issue originally had been whether Barr's use of materials in those OCWs amounts to the "placing" of material against the drainage layer or liner of a particular "disposal area" to prevent damage to the layer or liner, making it a deemed taxable disposal within Article 3(1)(g) of the 2014 Order. However, Mr Young latterly conceded that Revenue Scotland had not adduced evidence on that, and therefore did not advance that argument.

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[6] Parkwood Landfill Limited v HMRC [2002] EWCA Civ 1707 ("Parkwood")

42. In relation to the materials used by Barr in the construction of roads, the issue is whether the use is in the construction or maintenance of "temporary haul roads". If so, that use would be deemed to be a taxable disposal by reason of Article 3(1)(b) of the 2014 Order.

43. In relation to the engineering activities relating to construction of the OCWs, restoration and the construction of roads, the issue is whether those are prescribed taxable activities within Article 3(2) of the 2014 Order because of a failure to comply with a requirement to give intimation or notification in terms of Section 31 LTSA.

(c) Filter cake

44. The issue is whether, in terms of Section 13(3) and (4) LTSA the material comprising "Filter Cake" is "qualifying material" for the purposes of the SLfT "lower rate" because it is aluminium hydroxide which is listed in Article 2(1) and Group 6, Note 6(i) of the Schedule to the Scottish Landfill Tax (Qualifying Material) Order 2015 ("the 2015 Order") and with effect from 1 October 2016, Article 5(1) and Group 6, Note 6(i) of the Schedule to the Scottish Landfill Tax (Qualifying Material) Order 2016 ("the 2016 Order"). Both Orders are in identical terms.

(d) Penalties

45. Mr Young argued that, with the exception of the penalty relating to temporary haul roads, all of the penalties were imposed on the basis of deliberate behaviour by Barr or in the alternate it was careless behaviour. Mr Ghosh vigorously opposed the alternative argument on the basis that that had not previously been pled.

46. That objection, whilst understandable, cannot be upheld. Section 244(2) RSTPA provides that in respect of an appealable decision:

> "The tribunal is to determine the matter in question and may conclude that Revenue Scotland's view of the matter in question is to be—
>
> (a) upheld
> (b) varied, or
> (c) cancelled."

Therefore, whether or not Revenue Scotland had pled careless behaviour, the Tribunal should consider that aspect if they find that the behaviour is not deliberate.

47. Barr argues that it is not liable for penalties on the basis of either careless or deliberate behaviour as the self-assessments were correct in law and made after receiving professional advice. There was no inaccuracy leading to an insufficiency of SLfT.

D. Barr

48. Barr is a private limited company forming part of a much larger group which acquired Barr in 2007. That takeover resulted in changes in the management of the Sites

with the introduction of new personnel and systems. Its principal business activity is waste management.

49. Barr employs approximately 60 personnel and has a low turnover of staff.

50. Auchencarroch is located in the Kilpatrick hills and extends to approximately 40 hectares. It has been in operation for in excess of 20 years.

51. Garlaff is located in a former quarry and extends to approximately 62 hectares. It has been in operation for in excess of 15 years.

52. Landfill sites contain elements both of filling below and above the original ground. Although Garlaff was a quarry, nevertheless there is also above ground waste tipping which is described as a "landraise".

53. Whilst the Sites are in different locations and their topography differs, the systems Barr has in place and the manner in which it operates them are similar.

54. The November 2015 Report stated Barr had five principal customers which accounted for more than 90% of the waste brought on to the Sites. Two Local Authorities used Garlaff and two others and one large commercial client principally used Auchencarroch. They now have five Local Authorities as customers and we note that they were recorded as having five in the Ramsey Report.

E. Record keeping

(a) On site

55. Barr has a bespoke system called Landfill Skip System Variant 4 ("LS4"). It records not only the transactions but details about the customer including waste carrier licences, the material type received and its tax status, the date received, the European Waste Catalogue ("EWC") code, the time on site, the vehicle registration, the destination the material was taken to and from on site, and the weight of the material. It has capacity to store the tare (unladen) weight of the vehicle. It generates sales invoices. In essence it records all aspects of transactions for the Sites.

56. Barr records all movements of waste on-site either from the weighbridge as material enters or leaves the Sites or through on-site movement records. The basic records combine direct weighing through the weighbridge system and volumetric conversions to calculate the quantity of waste (as approved by Revenue Scotland). This is recorded either directly from the weighbridge or through manual input. We find as fact that the quality of their record keeping can be variable.

57. Site personnel keep tallies recording the number of dump trucks moving material out of the NDAs, the material transported and the destination on a daily basis. The site personnel include external operators who are "included" in the hire of equipment. They pass those numbers to the site foreman.

58. We accept the evidence of Officer Turner that on a site visit to Auchencarroch, on 19 April 2016, he and another officer spoke to three sub-contractors who were dump

truck and shovel drivers who gave him conflicting information as to how the load numbers were counted. They also spoke with the site manager and asked how the waste movements are added up. They recorded the response: "The drivers are quite forgetful. The dump truck drivers are unbelievable." and "The shovel drivers seem to have better numbers". Lastly, they spoke with the site foreman who contradicted what one of the sub-contractors had described as the system. We find as fact that operator error means that the accuracy of the record of movement of waste on site is open to question.

59. The site foreman collates that data on a spreadsheet on a weekly basis and passes that to Mr Ramsey who in turn analyses the data and creates a detailed "Onsite Movement Spreadsheet" recording each movement and that is input into LS4 by booking destination tickets for each load. The weight of material is recorded using the volumetric method approved by both HMRC and Revenue Scotland.

60. LS4 therefore should have a record of the source, temporary destination(s), final destination and weight of all material brought onto the Sites. The Finance Team then relies on the movements of material recorded on the LS4 to create monthly accounts and forecast Barr's SLfT liability. That forms the basis for making the relevant returns to SEPA and Revenue Scotland. LS4 generates a report of all of the transactions and those transactions are classified using the EWC Code which in turn is used to ascertain the rate of SLfT.

61. That is how the system is meant to work but as can be seen it is heavily reliant on the site personnel. We have no evidence as to how many of those personnel are sub-contractors or what churn there might be. Indeed we were unaware that there was use of sub-contractors until we had Officer Turner's evidence. We do not know what training, if any, they receive.

(b) Other record keeping

62. Mr Ramsey prepares the SEPA waste data return ("the SEPA return") and the Finance Team prepares the SLfT return. The first part of that return is a "supplementary spreadsheet" which Mr Ramsey prepares. That spreadsheet must match the first ten columns of the SEPA return. It sets out details for each EWC and material type and the tonnage information is itemised line by line and summarised for the Sites.

63. Barr produces Landfill Management Plans ("LMPs") for the Sites as required by the Pollution Prevention and Control Permits ("PPCs"). It has a suite of plans on different topics for the Sites and they are kept under review as significant changes are anticipated or happen. As they are amended they are submitted to SEPA. At any time there would be 25 or 26 for each site.

64. The various ones dealing with "Phasing, Acceptance and Emplacement" over the years state that the scope is to define the methods and principles to be adopted when receiving materials, including waste, at the Sites. The only reference to OCWs is at Section 13 headed "Recycling/Re-use of Waste Material" where it states:

> "Re-use includes any material which can be utilised for landfill site engineering where it replaces virgin resources, and can occur at any stage of the waste acceptance process, as detailed above. Potential engineering uses may include:

- Daily cover;
- Temporary and permanent site roads;
- Cell walls;

…

- Restoration"

65. There is no plan that shows where the OCWs were built albeit the phasing plans for the Sites, which are submitted as part of planning applications, show the approximate location of each cell.

66. Another LMP dealing with Stability Management is apparently dated July 2011 but which was operative only in 2017 references the methods and principles to be adopted to ensure slope stability "during cell construction and emplacement of waste".

67. Some of the other LMPs, mainly the Capping, Closure and Completion ones, but not all, reference restoration.

68. Mr Ramsey agreed that these, and we looked at a number, do not reference the method of construction of OCWs and nor do the PPCs.

69. Mr Ramsey explained that, from 2012, when the construction of the OCWs changed there was no need to alter the LMPs because what they were doing was to reduce risk in a number of areas because of the functionality of the cell walls. In his view, which was not shared by others, SEPA would only need to know about increased risk.

70. Barr did not keep a record of the percentage of fines generated from the MRF used for restoration compared with other materials. There are no "as built records".

71. Although site-won material, such as clay or soils, has historically been stored in the relevant NDA for site engineering, no records of their tonnage was kept until September 2018 when, at the behest of Revenue Scotland, Barr started to record that using volumetric conversion factors. (They still do not consider that to be necessary and only keep the record because the tax that is the subject matter of this appeal would not otherwise have been postponed.)

72. Barr argue that the reason they do not believe that site-won material needs to be recorded as part of the NDA records is based on SEPA's response on 10 August 2015 to Barr's application dated 3 August 2015 to register NDAs under Regulation 12 of the Scottish Landfill Tax (Administration) Regulations 2015 ("the 2015 Regulations"). That stated amongst other things that the approval was subject to compliance with a number of conditions including the fact that "all waste entering a non-disposal area must be logged in a non-disposal area record".

73. In cross-examination Ms Milligan confirmed that in advance of the introduction of SLfT she had read both Regulation 12 and Revenue Scotland's guidance which KPMG had sent to her. We have not seen KPMG's advice in that regard.

74. Whilst we accept that the SEPA letter referred to waste, nevertheless Revenue Scotland's guidance SLfT3011 Non-disposal Areas is explicit in its terms. In particular, it states that the landfill operator is required to identify

> "…clearly the quantities and type of material which relate to the different uses. In requiring you to designate a non-disposal area we will ask you to:
> …
> - Specify the uses to which material temporarily deposited in the area(s) is to be put;
> - Specify the types of material to be deposited in the area(s) …
>
> **Non-disposal area record**
>
> … The record must clearly identify the quantities and type of material which relate to different uses that you carry out. The record must include the following details for each time material is deposited in, or removed from, the area:

Material deposited in the area:	**Material sorted or removed from the area:**
Date deposited	Date sorted or removed
Weight and description	Weight and description
Intended destination or use	(In the case of removal) the actual destination it went to or use it was put to

".

75. As can be seen the guidance does not reference waste and speaks of material. That is because that is the wording in Regulation 12. The wording of Regulation 12 can be found in Appendix 1 but it is absolutely clear that all material including waste should be recorded.

76. Barr has been aware of Revenue Scotland's concern that site-won materials were not included in the NDA records since the site meeting on 7 September 2015 when the issue was discussed.

77. Barr has continued to argue that they are not required to record the site-won material. They are wrong. The NDA records are not complete.

78. Barr has not satisfied the notification requirement imposed under Section 30 LTSA and Regulation 12 of the 2015 Regulations and the construction of the OCWs, the roads and restoration are prescribed activities within the meaning of Article 3(2)(a)(ii) of the 2014 Order.

79. In the context of penalties, we do note however that on 14 February 2018, Brodies wrote to Revenue Scotland stating "There is no requirement to maintain records for site-won materials i.e. clay and other materials being used in cell walls. This material was never discarded at any time and therefore was never disposed of as waste at any time – therefore it is outwith the scope of Scottish Landfill Tax." Patently Barr took that advice which we find to be wrong.

F. Filter cake

80. Filter cake is a discrete issue.

81. Barr's position is simply that the material in question comprises aluminium hydroxide which is listed in Group 6 of the 2016 Order. Barr's argument is that that being the case the material qualifies for the lower rate of SLfT pursuant to Section 13(4) LTSA. We are in fact also dealing with disposals in periods when the 2015 Order is also relevant.

82. Barr also argues that it is entitled to rely on the description in the Waste Transfer Notes ("the WTNs").

83. By contrast, Revenue Scotland's position is that material disposed of as waste is standard rated unless either an exemption applies (which it is conceded is not applicable in this instance) or it falls within the classification of qualifying material. Section 13(3) of LTSA specifies that the material disposed of must consist "entirely of qualifying material". In terms of Section 14 LTSA, Revenue Scotland may direct that materials be treated as qualifying material if it would so qualify but for a "small quantity of non-qualifying material". There is no such direction.

84. Filter cake is a deposit of insoluble material left on a filter which is designed to extract particles from a liquid. The contaminated liquid is forced through the filter at high pressure to remove the particles. The particles are left on the filter and form the filter cake. This process takes place in a number of industries, for example, water processing plants and the oil industry.

85. One of Barr's clients sent Barr filter cake resulting from the processing of contaminated water. Filter cake can result both from the processing of fresh water and urban waste water and these each have different EWC codes, namely 19 09 02 and 19 08 05 respectively.

86. The WTNs from that client carried code 19 08 05. Barr accounted for and paid the lower rate of SLfT on 246.7 tonnes of filter cake that it received during quarters 1 to 4 of 2015/16.

87. The historical position is that in early 2012, HMRC had been asking about filter cake, so on 21 February 2012, that client had emailed Barr, enclosing five chemical analyses dated between 18 February 2011 and 8 February 2012 stating that: "PEAT FILTER CAKE & FILTER CAKE are both Aluminium Hydroxide" and going on to say that that fell within Group 6 of the UK Landfill legislation. The chemical analysis identified aluminium as the largest component but did not mention aluminium hydroxide.

88. Barr sought advice from KPMG and on 29 February 2012, KPMG wrote to Barr asking about the source of the filter cake, whether the material consisted entirely of aluminium hydroxide and if not, what else and in what proportions. We have not had sight of the reply or of the advice given.

89. What we do know is that Barr treated it as taxable at the lower rate which would only be applicable if it was almost entirely[7] comprised of aluminium hydroxide.

90. On 27 January 2016, Officer Hoey told Barr that the filter cake shown on the spreadsheet for quarter 2 of 2015/16 ought not to have been identified as aluminium hydroxide which was listed as a qualifying material in terms of the 2015 Order. That was on the basis that Scottish Water had accepted that filter cake generated by its processes was properly regarded as standard rated.

91. On 18 February 2016, presumably having been contacted by Barr, that client again emailed Barr and confirmed that the filter cake was aluminum hydroxide.

92. On 19 February 2016, another client wrote to Barr confirming that their previous load of filter cake was aluminum hydroxide.

93. On 26 February 2016, KPMG wrote to Revenue Scotland stating that: "As tests had confirmed the filter cake comprises aluminium hydroxide" and went on to state that the "tiny" traces of water were incidental. No test results were produced and it is not known from whom KPMG derived that information.

94. Revenue Scotland checked the position with Scottish Water who confirmed that the organic matter outweighed the level of aluminum hydroxide and that the water content was high. On 18 March 2016, Revenue Scotland wrote to KPMG confirming that the test results provided to HMRC (and disclosed to Revenue Scotland) showed that the content of the filter cake was 75.36% water, 11.63% mineral matter including 5.1% aluminum hydroxide and 13.01% natural organic matter. Reference was also made to a letter from Scottish Water.

95. Scottish Water had forwarded a letter received by them from HMRC to landfill operators in March 2014. Insofar as relevant, the HMRC letter said:

> "From the information provided I have concluded that aluminium hydroxide filter cake resulting from the treatment of fresh water does not consist entirely of qualifying materials nor does the percentage of non qualifying materials fall to be considered under the 'small quantity' concession within section 63.
>
> This material is therefore subject to the standard rate of landfill tax when disposed of by way of landfill."

96. Initially Barr, and KPMG, denied any knowledge of that letter but later conceded in correspondence with Revenue Scotland that Barr had indeed received it in 2014.

97. On 15 April 2016, KPMG replied pointing out that as this letter only referred to "aluminium hydroxide filter cake resulting from the treatment of fresh water", which has the EWC code 19 09 02, Barr had changed its tax treatment of filter cake in respect of EWC Code 19 09 02 but did not change its tax treatment of material of EWC Code 19 08 05, on the basis that this latter material was obtained from the treatment of urban waste water.

[7] Section 14 LTSA

98. Apparently Barr were aware that Scottish Water had intimated its intention to challenge HMRC's ruling in relation to the standard rate for EWC code 19 09 02 (fresh water).

99. On 26 April 2016, Officer Turner asked Barr to produce copies of analysis carried out on waste received with EWC Code 19 08 05.

100. On 29 April 2016, KPMG responded enclosing the copies of the chemical analyses and email referred to in paragraph 87 above and copies of the earlier emails. No subsequent tests had been done on the filter cake.

101. Officer Hoey replied on 4 August 2016 pointing out that the analysis predated the introduction of SLfT and in particular the 2015 Order and that the primary component of the five analyses of filter cake from 2011/12 (she incorrectly referred to KPMG having sent "samples") was water with an average water content of 81.9% so the standard rate of tax should apply. She pointed out that "sludges from treatment of urban waste water" is not listed in the 2015 Order.

102. Correspondence ensued and on 17 October 2016 KPMG wrote to Revenue Scotland conceding that that waste had been incorrectly charged and that tax of £123,139 was due.

103. On 8 December 2017, KPMG wrote to Revenue Scotland reverting to the view that the filter cake was aluminium hydroxide.

104. On 31 July 2018, Officer Hoey issued the Closure Notices, Notices of Assessment and Penalty Assessments that are the subject matter of this appeal.

105. There is no evidence that the material disposed of under EWC Code 19 08 05 comprises entirely aluminium hydroxide. On the contrary Barr's own evidence from 2011/12 does not even include those words and there was a high moisture content.

106. Mr Ramsey's explanation that because the client had told him that it was aluminium hydroxide and the largest component in the analyses was aluminium, he assumed that aluminium meant aluminium hydroxide was frankly not credible. Firstly, if one looks at the Glenfarg sample, to which Mr Ramsey was referred, there are two different entries for aluminium. Group 6 of the 2016 Order includes both aluminium hydroxide and aluminium oxide. Secondly, there are no less than 20 other components identified. Even if one of the entries was aluminium hydroxide it was not entirely comprised of that. There is no direction from Revenue Scotland.

107. As can be seen from paragraph 87, KPMG were undoubtedly consulted and more pertinently were plainly aware that in order to be taxed at the lower rate, the filter cake would have to be entirely comprised of aluminium hydroxide.

108. On the balance of probability, given KPMG's letter of 26 February 2016 to Revenue Scotland, Barr must have told KPMG that that was the case. Patently it was not.

109. Barr should have been aware of the HMRC ruling for Scottish Water and should have treated the filter cake as standard rated. The fact that they were aware that Scottish Water had intended to challenge HMRC's ruling, reinforces that position. Like Scottish Water, they should have paid the standard rate and, had Scottish Water succeeded, then reclaimed any over-payment. In the event, of course, whether or not Scottish Water challenged HMRC's ruling, they certainly were not successful.

110. The argument about EWC Code 19 08 05 is simply a red herring since that is not specified in the 2015 Order. We find that Barr's behaviour in this matter was deliberate.

111. Lastly, it was argued that, in terms of Regulation 2(5) of the 2015 Order, Barr was entitled to rely on the WTN where title has not passed expressly. Firstly, there is no reference in the Regulation to title passing expressly. We had limited evidence on title. In her witness statement Ms Milligan said "… when material was received by Barr it was taken into our ownership …". However, in the Ramsey Report, Mr Ramsey said that "In summary, all contracts either stipulate ownership as being that of the contractor (i.e. BEL) or do not designate ownership either way …" with the exception of one council which transferred residual waste from council collections but retained ownership of all other residual fractions. However, in their recent written submissions, Barr states in relation to waste materials used for on-site engineering that it is common ground that title had passed. It seems likely that the contracts relating to filter cake would ensure that title passed. We find that on the balance of probability, Barr would have been the owner of the material immediately prior to the disposal, so the Regulation does not apply.

112. The wording of Regulation 2 can be found in the Appendix. Even if we are wrong in finding that Barr was the owner at the point of disposal that does not assist Barr. The Regulation states that the material must comprise only aluminium hydroxide. Barr knew that it did not. Further, Regulation 2(5) must be read as a whole and the description must be <u>accurate</u>. It was not.

113. For completeness, we record that we have not seen KPMG's advice on filter cake or what Barr told them and we do not know why their concession in October 2016 was withdrawn.

114. We find that the default position applies and this is a disposal of waste which is subject to the standard rate of SLfT. The assessment in that regard is confirmed.

G. The non-tax Regulatory Environment for the Sites

115. One of the key objectives of the regulatory regime has been to minimise the environmental impact of landfill sites and, in particular, the risk of contamination of the environment around such sites. Therefore the Sites are not simply a dumping ground but rather a carefully managed location in which the design, construction, operation, restoration and aftercare should all play a part in reducing the environmental impact.

(a) Planning permission

116. Of course, every landfill site requires planning permission and as part of the application for planning permission there is a phasing plan which shows the approximate

location of each cell and the boundaries on that would indicate roughly where the cell walls are located.

117. The planning teams within the Local Authorities carry out annual inspections to ensure compliance with planning permission requirements.

118. As required, Barr not only obtains any necessary planning permissions but also building warrants, licences and permits that may be required by the relevant Local Authorities.

119. Both Auchencarroch and Garlaff have the capacity to be operational for the next 15 to 20 years. The respective planning permissions currently held by Barr for the Sites states that "the approved landfill operations to be completed by 31 December 2022"[8] and "the approved landfill operations shall be completed within 20 years of the commencement date of the operations at Garlaff Landfill Extension"[9].

120. The planning permissions require Barr to restore the Sites progressively to the agreed contours illustrated in the master plans.

(b) Pollution Prevention and Control permit ("PPC")

121. Barr requires to be licensed by SEPA to carry out landfill activities and therefore has PPCs issued by SEPA for the Sites. Each PPC is issued pursuant to the Pollution and Prevention Control Act 1999, the Pollution and Prevention Control (Scotland) Regulations 2000 ("the PPC Regulations") and the Landfill (Scotland) Regulations 2003. Variations can be, and are, sought to the permits in terms of Regulation 13(5) of the PPC Regulations. Both have been varied since their issue on 8 September 2004 (Auchencarroch) and 17 June 2004 (Garlaff).

122. The PPC allows Barr to operate a non-hazardous waste landfill installation at the Sites subject to conditions ("the permit conditions"). The PPCs regulate the entire lifespan of the Sites from the commencement of operations to site closure and for a subsequent post-closure aftercare period of at least 30 years (Mr Hodges said 60 years).

123. The PPC dictates precisely what activities can be carried out on the Sites. The PPC covers almost every aspect of the operations from the hours of operation, the requirement for a weighbridge, the types of waste that Barr is entitled to receive, the capping and liner systems for the cells, landfill gas and leachate collection, pollution control and the records that they are required to keep. It also covers restoration and aftercare of the site.

124. SEPA is responsible for monitoring whether Barr is complying with permit conditions and carries out audits and inspections based on environmental risk and operator performance. Barr has a designated SEPA Officer who audits its facilities on a quarterly basis. In addition to the scheduled visits SEPA makes targeted visits in the event that a complaint is received. They also carry out additional regulatory visits on at

[8] West Dunbartonshire Council, Grant of Planning Permission, 18 September 2002, paragraph 01
[9] East Ayrshire Council, Grant of planning Permission, 18 September 2002, paragraph 01

least a monthly basis. They monitor levels of windblown litter, vermin and pest control and analyse samples from the water courses.

125. Officer Clothier, whose evidence is referred to in other witnesses' evidence, albeit he did not give evidence due to ill health, was formerly an Environmental Protection Officer ("EPO") for Barr, ie the designated officer. The EPO role is to assist Barr to comply with its permit conditions and to regulate the site. The EPO works within the Landfill Regulatory Team at SEPA and is responsible for monitoring compliance.

126. The EPO would generally assess a restoration plan or restoration management plan and might give advice on restoration.

127. After each site inspection the EPO issues a summary report recording the findings and in particular any breach of the permit conditions. There have been no breaches in the relevant periods.

128. SEPA have a policy of "beyond compliance", referred to in their "One Planet Prosperity" strategy whereby they encourage operators to not only meet but exceed their permit conditions. If that is achieved lower fees will be charged. Mr Ramsey's unchallenged evidence was that Barr have achieved that.

129. There have been no enforcement notices served on Barr by SEPA for more than a decade.

(c) Construction Quality Assurance ("CQA")

130. The PPCs make provisions for engineering works to be carried out under a CQA which is defined in the PPC as "…a planned and systematic application and recording of methods and actions designed to provide adequate confidence that items or services meet contractual and regulatory requirements and will perform satisfactorily in service".

131. A CQA is typically required for all aspects of containment engineering and infrastructure including permanent capping, engineered temporary caps when completing permanent capping (not cover materials) and environmental control systems. Interim caps are not covered by the CQA scheme.

132. Barr has always understood that the three main activities for which the PPCs require a CQA process are:

(a) the construction of the basal containment system of the cell,
(b) permanent capping of a cell, and
(c) installation of the landfill gas extraction on the Sites.

We heard no evidence that challenged that. Furthermore Mr Ramsey's unchallenged evidence was that the construction of cell walls was not an engineering activity that required a CQA. Officer Turner confirmed that restoration does not have to be included in a CQA and nor would further restoration works necessitated by settlement.

133. A CQA plan confirming the design (which takes into account the scope of the works and the performance requirements), methods, specification of materials, personnel

involved, and testing requirements is submitted to SEPA at least 28 days in advance of the works to allow the plan to be scrutinised and challenged, if appropriate. The EPO will assess it in the first instance and might get other specialist advice, if needed. Ultimately, it has to be agreed or the work cannot proceed.

134. The CQA plan is limited to the construction of certain components of the cell. Restoration in itself does not have to be included in a CQA plan but it is not uncommon for it to be included on the basis that it is technically another layer on top of the other layers that would form the construction of the landfill cell.

135. Although Mr McMeekin used the term CQA to refer to the formal third party CQA, both experts agreed that a CQA plan can be much wider than that which is required by the regulator. It can also include written notes or sign-off sheets or diary entries for works that would be carried out by the plant, the machinery or the people on site. It could also be photographic or verbal reports.

136. For a formal third party CQA, an independent CQA engineer, who is suitably qualified and experienced, monitors the works in accordance with the CQA plan using agreed record templates.

137. A CQA engineer might be on site every day when there is ongoing construction checking the laying of the clay, the sealing of an HTP liner, leak detection and generally ensuring that the quality of the construction job was done to a sufficient specification. The engineer might also visit the site while the first few layers are put into the cell. There might be subsequent visits.

138. At the end of the works a CQA validation report is compiled to confirm that the works were undertaken as proposed and that is usually lodged within three months of completion of the work. All testing results and observational records generated are included to complete the reporting.

139. The CQA process is intended to ensure that engineering works are appropriately designed and delivered to ensure the intended environmental protection and also compliance with the relevant legislation and guidance. In addition, the CQA process ensures that all aspects of the design, construction and testing are documented to provide an audit trail.

140. The CQA process is regulated by SEPA and there have been no incidences of non-compliance in the last decade.

H The Sites

(a) Overview

141. As the FTT found in *Devon* 1 a landfill site is a carefully managed location in which the design, construction and operation of the site all play a part in reducing the environmental impact. Landfill sites are complex environments with infrastructure and engineering requirements. Each site is split into individual units known as “cells”. Auchencarroch has 19 cells and Garlaff 15 cells.

142. Barr needs to maintain a network of roads around the site to allow both vehicles and mobile plant to gain access to different parts of the site.

143. Barr built an MRF at Garlaff in July 2012 and at Auchencarroch in March 2014.

144. At Auchencarroch there are 8 NDAs and at Garlaff there are 11.

(b) Cells

145. Regardless of the type of landfill, development is carried out in a phased manner to construct containment cells of sufficient size to match the anticipated input.

146. With the exception of the disposal of asbestos, which is the only hazardous waste that Barr is licensed to receive and which goes into a completely different cell, Barr's PPCs require Barr to have only one cell fully operational at a time.

147. Waste disposal operation in each cell would typically last for two or three years before the void is full and the cell is capped (closed). Barr's PPCs require that Barr caps a cell within 3 months of commencing a new cell, to allow a "switchover" between the current cell and a new cell, but other than that, only one cell is active for the disposal of non-hazardous waste at any one time.

148. A CQA plan is required for each new cell. Those do not reference cell walls nor interim capping unless permanent capping is to be carried out at the same time.

149. Each cell starts life as an engineered depression which is a large excavated hole in the ground. That is referred to as "the cell base". Cell bases are physically separated from each other by "bunds" throughout the excavation process and subsequent lining. A bund is a small bank of soil or other inert material used to define the limits of cells.

150. Cells are prepared and engineered no more than approximately six months in advance of their projected use.

151. To protect the environment and human health, the base of the cell is lined with a layer of clay, a geosynthetic clay liner, a layer of geomembrane and a geotextile layer. This is known as the "basal lining system".

152. When waste decomposes it generates landfill gas and a liquid, known as leachate. The former is highly flammable and the latter toxic to aquatic life and has to be treated in a leachate plant which reduces the amount of bacteria in the liquid to an acceptable level to allow the liquid to be released into the local water course.

153. In each cell there is a series of wells and pipes which are inter-connected and collect either the gas or the leachate. The leachate is treated in a plant before being discharged into the local water course and the gas is stored/collected and exported to the National Grid.

154. The process known as capping is designed to capture the residual landfill gas and the leachate produced. The cap lining system is brought up over the waste mass and tied into the basal lining system. The liner is then covered with restoration material.

155. Cells continue to be built during the lifespan of the site which can be 20 or 30 years. After a cell has been capped it is restored to make it fit within the local environment. On completion of the last cell the whole site will have a network of cells on it.

156. Due to the topography of the Sites some 90% of the landfill is landraise which extends to between 30 and 40 metres above ground. Typically when tipping starts the cell will be approximately 5 metres deep. Each cell is filled in 3 metre lifts. A lift is the industry terminology which means the layering of waste within the cell. When waste is tipped into the cell it is spread out by a landfill compactor into a lift that is approximately 3 metres deep. The compactor then drives continuously over the layer of waste until it has been compacted down to approximately 2 metres in depth. The next section of cell wall is then constructed. As the waste rises above ground level it must be contained for both environmental and safety reasons. We describe the process in more detail at Section N.

157. There is no regulatory requirement to build an OCW and OCWs are not included in any of the LMPs other than as a bullet point for potential engineering uses of waste. OCWs are not defined in either statute or regulations and there are no published specifications or requirements.

158. Within the cells there are cell bunds. These segregate specific parts of the cell to accept a particular type of waste such as sludge waste. They are not OCWs. Material used to construct them is taxable.

(c) Roads

159. During both the operational phase and thereafter, access is required to different parts of the Sites by both vehicles and mobile plant on what is known as a haul road network of temporary and permanent roads.

160. Roads are also required to allow:

(a) deliveries of materials to be received on to site and then taken to the area where they will be used. For example, the geotextile lining and capping materials; leachate consumables and landfill gas extraction infrastructure are all delivered to the Sites and taken by road-going lorries to the area of the site where they will be used. Large road vehicles such as these require an engineered road to travel on, and

(b) access for carrying out restoration work on different parts of the Sites. In a letter dated 21 March 2017, KPMG confirmed that PCM, which was exclusively used in restoration until 2015 when its use ceased, was "usually" taken close to the point of use immediately after arrival as it would normally be used within a day.

161. In the period after waste disposal operations have ceased, which is known as the aftercare phase, permanent roads are required to allow Barr to continue to carry out environmental monitoring and to maintain the environmental control systems for landfill gas and leachate. This is a PPC permit condition. Roads are also required to allow access for any further restoration work (eg tree planting) that may be required and that is

a requirement of the restoration plans. The aftercare phase lasts at least 30 years after the operational phase has ceased.

162. The temporary roads give access to the cell that is in operation. The tipping zone moves during the lifespan of the cell and therefore the temporary road moves to meet the operational need. Ultimately the temporary roads are subsumed into the cell because they are almost entirely situated within the cell.

163. We can see from a letter from KPMG to Revenue Scotland dated 16 December 2016, that they argued that permanent roads are located entirely outwith the cells, either going around the perimeter of the cells or over the top of the capped cells. That is consistent with Mr Ramsey's evidence.

164. However that letter goes on to say that "In contrast, temporary roads consist entirely of a single layer of … A wearing course layer is not used and the roads are not surfaced". That is in complete contrast with Mr Ramsey's evidence to the effect that there is "… fundamentally no difference in how the temporary and permanent roads are constructed … the definition of permanent and temporary comes down to how long the road will exist for."

165. Mr Hodges was clear that firstly, temporary roads do have a wearing course layer and secondly that the design of a road will depend on its purpose and longevity.

166. We find that KPMG's understanding was flawed, although we do not know why.

167. We accept Mr Hodges' clear statement that "In time, the main function of these roads will change and with less heavy use can be finished off with a new wearing course suitable for its new purpose. The underlying sub-base material will have a permanent role in providing support for the new surface."

168. When a permanent road is constructed Barr engages the services of an external land surveyor who is responsible for the design and location of the road. He consults the site plans and planning permissions and discusses with the operations team what phase the site is in and why the road needs to be constructed. He liaises with them to ascertain the location and height of the road and from those discussions, a skilled drawing is produced showing the route, length, width, camber, corner angles and any other pertinent detail of the road. The design is then agreed by the operations manager or modified, if necessary, to ensure that the road is fit for purpose. The surveyor then does a site visit and uses pegs to mark out the section of road that is to be constructed and those define the length and width of the road. The construction work itself is undertaken by Barr. No such drawings have been produced to the Tribunal or to Mr Hodges. Indeed in regard to roads he stated unequivocally in his report that "I have not been able to verify the linear extent of the claimed road network".

169. There are no written specifications for the roads and Barr relies on the experience and knowledge of its senior site operatives.

170. The length and width of the roads vary. The width of permanent roads varies between 5 and 18 metres depending on the size and weight of the vehicles that would use them.

171. The permanent roads are engineered in discrete layers. The first layer is a sub-base which is approximately 0.5 metre deep. It consists of materials recovered from waste and aggregate and that would include rubble, brick, concrete and soils. That would be the heavier fraction from the MRF although the lighter fractions might be used. Officer Hoey accepted from a document on engineering tonnages for April 2015 to September 2017 that mixed municipal waste had not been used in roads since the last quarter of 2015.

172. Permanent roads used exclusively for the movement of tracked mobile plant would not have any further layers added.

173. The other sub-base layer for the other permanent roads are overlaid with a surface wearing course layer applied to a depth of approximately 0.3 metre. That layer is virgin material consisting of a high Polished Stone Value aggregate ("PSV course") which provides traction for the vehicles. The majority of the permanent roads on the Sites are left with the PSV course as that suffices for many vehicles. Mr Hodges was clear that that was also used on temporary roads.

174. The balance of the permanent roads (40% at Auchencarroch and 20% at Garlaff) are asphalted because they are heavily trafficked. All of the permanent roads have to be maintained.

175. Most permanent roads have drainage systems such as ditches and culverts to carry away surface water run-off.

176. Some cells require the road accessing it to be constructed on a gradient and as the height of the cell rises the road needs to rise too. Those roads are therefore constructed in multiple layers. The roads may be "heightened" by up to 20 metres.

(d) Material Recovery Facility ("MRF")

177. Barr has produced no contemporaneous evidence of their business case for the MRFs. All we have is the tender documents for two of the Local Authorities to which we refer in the introduction. We know that the initial investment in the MRFs was £4.7million with further expenditure thereafter.

178. An MRF is essentially a recycling and reprocessing centre designed to sort and process waste received by a landfill operator and they are bespoke. At each MRF there are two bays, one for bulky items and the other for smaller items like black bags.

179. The MRF incorporates a number of mechanical processes to separate out the constituent parts of the incoming waste stream, in order to recover recyclable components and other relatively non-compactable materials. Using shedders, trommel screens (large cylindrical sieves), magnetic and eddy current separators, and density classifiers, in combination with manual hand-picking stations, it recovers metals (both ferrous and non-ferrous), wood, textiles, rubble and plastic.

180. Source segregated dry recyclables such as cans, tins and bottles, when recovered from the MRF, are sent off-site for recycling.

181. PCM does not pass through the MRFs. The first items to be segregated at the MRFs are bulky items such as mattresses, carpets and large metal or plastic items. The incoming waste stream comprises mixed municipal and construction waste and commercial and industrial material.

182. The first MRF became operational at Garlaff in July 2012 and a similar MRF became operational at Auchencarroch in March 2014. The MRF in Garlaff evolved over a period so although it was operational for shredding and trommeling in June or July 2012, over the next months the density and magnetic separators were added. The output of material suitable for on-site engineering gradually increased so the tonnage used in cell walls increased between 2012 and 2014.

183. The MRF at Auchencarroch was not staged in that way. Although fully operational from March 2014, the output for on-site engineering was primarily utilised for restoration so it was not until 2015 that the new design of the OCW was implemented at Auchencarroch.

184. By Mr Ramsey's own admission, the use of the MRFs has meant that approximately 5-7% of the waste is sent for recycling and approximately 63% is used for engineering purposes on the Sites.

185. Waste leaving the MRF is generally given the same description it had when it entered the site, although it is then in different size and weight portions.

186. The flow chart produced by both Barr and Mr Hodges shows that the materials used for the OCWs is derived from a combination of four separated fractions from the MRF (Mr Hodges said three but he had combined the two fines being the smaller output from the MRF). The incoming waste has the bulky recyclable material removed. It is then shredded to reduce the particle size to 150-300mm. That is the heavy fraction. The coarse or light fraction is smaller and is between 40mm and 300mm. The fines fractions are less than or equal to either 40mm or, after going through what is called the reclaimer less than or equal to 10mm. The latter (10mm) fines are also used for restoration. Rubble is used for roads. The flow chart, and we do not know the reason for which, or the date on which it is produced, simply says in relation to the materials used for OCWs that these fractions "Can be used".

187. Barr also uses some of the material for daily cover (ie covering the waste each day) on which they do pay SLfT.

188. The composition of light fractions, heavy fractions and fines from the MRF depends on the input to the MRF each day and as there is a wide variety of input, the output varies considerably. However, once engineered by the excavator and landfill compactor, it is alleged that the yield in terms of stability in the cell walls should be consistent. Mr Hodges made it explicit that "There wasn't a specific control mechanism in place."

189. Both MRFs were designed with a view to producing material for the post-2012 design of the cell walls.

190. Barr has contracts with Local Authorities which have source segregated organic waste collections. Theoretically, that should mean that the majority of food and garden waste would be removed before the waste arrived at the Sites. We do not accept Mr Ramsey's bland assertion that organic waste had been segregated.

191. A brief glance at any communal bin will show the observer that the general public are regrettably poor at recycling. Officers visiting the Sites on a number of occasions identified organic material, sometimes in significant quantities. Many of the photographs lodged in evidence show such waste. In practice, the reality is that there is still putrescible material included in the municipal waste. In general, Barr relies only on visual inspection to ensure that the MRF output is inert but we accept Mr Hodges' opinion that the method of operation of the MRF means that there is an "inherent risk" of contamination.

(e) Non Disposal Areas ("NDAs")

192. Where material at a landfill site is not going to be disposed of as waste and Revenue Scotland considers there to be a risk to the collection of SLfT, the material must be deposited in a NDA and the operator must give Revenue Scotland information and maintain a record in accordance with Regulation 12 of the 2015 Regulations.

193. On 16 March 2015, Barr applied to Revenue Scotland to have the IAs, which had been approved by HMRC at that time, for both Sites, registered as NDAs.

194. The table that was annexed to the letter for Auchencarroch reads as follows:

Information Area	**Date of Commencement**	**Uses for Material**	**Types of Material Deposited**	**Estimated length of storage time**	**Area Boundaries**
NDA 1	September 2009	Temporary storage area for source-segregated loads or loads with every high recyclable/re-usable content identified at weighbridge	Mixed wastes, garden waste, sub-soils, metals, glass, paper & cardboard, general	3 months maximum at a time	See plan above
NDA 2	September 2009	Temporary storage/processing areas for loads found to have a significant recyclable/re-usable content following tipping	Mixed waste loads containing high recyclable/re-usable content [eg sub-soil, rubble, metals, paper, cardboard]	12 months maximum at a time	See plan above
NDA 3	September 2009	Permanent site roads	Aggregates, mineral clay, construction & demolition wastes, fines from processing of mixed waste loads	Permanent	See plan above
NDA 4	October 2010	Construction of outer landfill containment wall	Aggregates, mineral clay, construction & demolition wastes,	Permanent	See plan above

			fines from processing of mixed waste loads		
NDA 5	September 2011	Landfill gas drain	Shredded timber	Permanent	See plan above
NDA 6	August 2010 [estimated to be complete by February 2016]	Site restoration	Sub-soils, fines, construction & demolition wastes, compost, compost-like output	Permanent	See plan above
NDA 7	January 2012	Temporary storage/processing area for MSW and similar wastes and storage of recovered recyclables	MSW and other residual wastes, metals, cardboard, wood, plastics, RDF	2 months	See plan above
NDA 8	January 2014	Temporary storage of food and garden waste	Source – segregated food and garden waste	3 days	See plan above

There was a similar table for Garlaff. These tables were in the same format as the notification of IAs to HMRC. As can be seen, and as Officer Hoey pointed out NDAs 3 and 4 for roads and OCWs state that the material is "from processing of mixed waste loads" and NDA 6 for site restoration does not and yet those materials are derived from that. We have checked and the wording for those NDAs is precisely the same as on the IA notifications in 2012 approved by KPMG (in 2013 it said "trommeled" rather than "processed" but reverted to trommeled in 2014). No explanation has been provided for the discrepancy.

195. On 10 August 2015, Revenue Scotland approved all of the NDAs that Barr had applied for at the Sites and that subject to the following caveat:

"This is subject to your compliance with the following conditions:

- We do not require you to fence off your non disposal areas but they must be clearly identifiable for site staff and for inspection by delegated SEPA Landfill Tax officers.
- Should you require variations in the size or boundaries of the non-disposal area, prior approval must be sought from Revenue Scotland.
- Where bulk waste is stored in a non-disposal area and the earliest stored waste is inaccessible or unidentifiable, we will treat removals from the area as movements of that earliest stored waste.
- All waste entering a non-disposal area must be logged in a non-disposal area record. The record must include the following details for each time material is deposited in, or removed from, the area:

Material deposited in the area	**Material sorted or removed from the area**
Date of deposit	Date sorted or removed
Weight and description	Weight and description

Intended destination or use	(In the case of removal) the actual destination it went to or use it was put to"

As can be seen, the table is almost identical to the table in Revenue Scotland's guidance SLfT3011 (see paragraph 74 above).

196. When Barr applied for the NDAs at the Sites to be registered, it also asked Revenue Scotland to dispense with the requirement for weighing material entering and leaving the NDAs and instead asked if Barr could continue to quantify material in and out of the NDAs using a volumetric calculation approved by HMRC. On 6 and 9 October 2015 both SEPA and Revenue Scotland granted Barr's applications to use the alternative volumetric calculations to record the movement of material in and out of the NDAs registered on the Sites.

197. Barr update Revenue Scotland, as they did HMRC for the IAs, on the location of the NDAs on an annual basis, as the position of the NDA can change slightly as the landfill site develops.

I The journey for waste on the Sites

198. Barr has contracts and agreements to accept waste from both Local Authorities and private companies.

(a) The weighbridge

199. The entry point to the Sites is a weighbridge and, with one exception, the incoming vehicle is weighed. That exception is for waste arriving at Garlaff and emanating from Barr's other facilities at Auchencarroch, Heathfield and Southhook where it will have been weighed.

200. The truck driver bringing in the material should have a WTN which describes the type of waste that is being transported, the source of the waste and the EWC Code.

201. The purpose of the EWC Code is to allow regulators, operators and waste carriers to identify the types of material with which they are dealing. The EWC Code breaks materials down into a six digit code based on the materials composition; whether it is hazardous or not and the process that produces the waste. It is a legal requirement that all WTNs carry a EWC Code.

202. The EWC Code determines whether SLfT should be accounted for at the standard or the lower rate if the material is disposed of to landfill or is used for a Prescribed Activity as defined by the 2014 Order.

203. There is no specified format for a WTN but it must be signed both by the person delivering the waste and the person accepting the waste. Barr either gives a physical copy to the driver or emails a copy.

204. On receipt of the WTN, in order to check that the load accords with the EWC, the weighbridge operator visually inspects the load, insofar as possible, either physically or

using the CCTV cameras positioned on the weighbridge. That check also allows the operator to direct where, on the Sites, the load should be sent.

205. After that visual inspection, the vehicle is weighed on the weighbridge and the gross weight is recorded on LS4 and a weighbridge ticket is generated. LS4 may have a record of the tare weight, ie the weight of the vehicle when it is empty of waste but, if not, the vehicle is weighed again on leaving the site so the net weight of waste can be calculated and recorded on LS4. The final weighbridge ticket is generated, the vehicle driver signs it and is provided with a hard copy, if required, to return to the customer. An electronic version is retained in LS4 and Barr having scanned the WTN, there should be a record of the EWC Code, waste description and net weight of the waste.

206. If a driver does not have a WTN then the weighbridge ticket doubles as a WTN in that it records the same information.

207. The operator should check that the EWC Code accords with what is being delivered, identify the waste description on the WTN and the source of the waste. The objective is to ensure that Barr is licensed to receive the material that is being delivered. In terms of the PPC, Barr is only licensed to accept certain types of waste, both hazardous and non-hazardous. The only permitted hazardous waste is asbestos. Although the PPC allows them to receive other hazardous waste, such as batteries, those cannot be put into landfill and they are then transmitted to third-party specialist re-processors.

208. The weight of the load is recorded in tonnes and referred to as “tonnage” and is the basis for calculation of SLfT. It is also a requirement of the PPC.

209. The weighbridge operator books the load to the areas of the Site where the load will be sent.

(b) Movement on site

210. On leaving the weighbridge, the load is sent to different areas of the Site. The nature of the material received will dictate the destination. A high proportion of material received does not get booked directly to a cell. Any further on-site movement of the material is recorded through the on-site movement records.

(i) Unusable material

211. Asbestos is sent straight from the weighbridge to the asbestos cell. Certain other loads will be sent directly to the cell for disposal because they are not capable of any recycling.

(ii) Heavy reprocessable material

212. Heavy reprocessable material, such as construction and demolition wastes, soils and rubble or loads with a high proportion of timber would be booked to the recycling and bulking NDA on the Sites for further segregation and processing. Material that cannot be reprocessed would then be reloaded into dump trucks for disposal in the landfill cell without any processing.

213. Materials that have been segregated and are recyclable but cannot be further processed on the Sites, such as metals and timber, are then sent off-site (passing across the weighbridge) to a third party reprocessor such as a recycling company.

214. The material that can be reprocessed is booked to several different NDAs, depending on the proposed use for it, such as for OCWs, restoration and permanent roads.

(iii) Municipal solid waste

215. These are mixed loads of material which might contain a smaller amount of construction and demolition waste or soil, rubble and timber but the greater proportion of it is mixed residual waste. That comes from domestic households, commercial premises and other municipal waste collections such as from parks, gardens and other Local Authority generated waste.

216. Apart from the construction and demolition waste, soils, rubble and timber which will be segregated, mattresses, large plastic or metal bulky items, carpets and textiles will be sent to the recycling and bulking NDA for storage and onward transmission either off-site to the third party or to another NDA depending on its proposed use. Anything that cannot be recycled or used will be sent to the cell.

(iv) Site infrastructure materials

217. Material that has been already processed by others but is deemed suitable for use in site engineering without further processing is sent directly from the weighbridge to the appropriate NDA eg OCWs, restoration or roads. PCM was, in most instances, sent directly to the area where reconstruction was being done.

J SEPA's involvement before the introduction of SLfT and after 2012

218. On 26 June 2014, Officer Allan and other colleagues visited Garlaff. A vehicle from one of Barr's clients was at the weighbridge and Officer Allan asked for sight of the WTN. The driver described the waste as PCM from a trommel. The weighbridge clerk informed Officer Allan that 50% of the waste was charged at the lower rate of the tax with the remainder charged at the standard rate. Samples were subsequently taken from the waste when it was delivered to the tipping face.

219. On 2, 4 and 5 September 2014, Officer Allan and other officers interviewed a number of individuals and took statements. Those have not been produced. Officer Allan's comments thereon demonstrate inherent contradictions such as conflicting suggestions that the client referred to in the previous paragraph accounted for 45% of the waste at Auchencarroch of which 35% was PCM or alternatively that the figures were 65/70% and 25% respectively. In any event that is hearsay, which is admissible but it all relates to a period with which we are not concerned.

220. Furthermore, as Revenue Scotland concede, PCM does not feature directly in this appeal. In fact, in our view, its only relevance is that it triggered an investigation by SEPA which has not resulted in any action being taken by SEPA. We agree with the arguments

put forward for Barr that Officer Allan's evidence was not relevant to this appeal and that it is not even relevant to the appeal in the UK Tribunal since the issue of PCM was relevant only to restoration and HMRC did not pursue Barr for any tax liabilities relating to restoration.

221. The only relevance of Officer Allan's evidence is that on 7 October 2014, Officers Allan and Turner met HMRC and gave them a file containing witness statements, a chemical analysis of the samples, and productions gathered during site visits. On 16 October 2014, the Officers again met with HMRC to discuss the file and the possibility of future investigation.

222. SEPA became embedded in Revenue Scotland teams with the introduction of SLfT and in terms of Section 4(1)(b) RSTPA Revenue Scotland can, and does delegate functions to SEPA. In particular Revenue Scotland delegated those arising from Regulation 12 of the 2015 Regulations. They issue joint letters when dealing with delegated functions.

K HMRC's involvement

223. Although HMRC have had a long involvement with Barr, the first involvement that is relevant for these purposes was in 2013. On 1 and 2 October 2013, Officers Mitchell and Sedstrem conducted a "full assurance" visit in preparation for the introduction of SLfT from 1 April 2015. They wished to ascertain any potential liabilities, establish the position in regard to IAs and to review the records.

224. Officer Mitchell produced to the Tribunal the detailed record of that visit to Garlaff where they saw the MRF and noted the IAs. They travelled in a vehicle and did not alight. They did not see any restoration work being done or the construction of an OCW although the wall of cell 3 would have been visible. There was no detailed discussion about the method of construction of the OCWs beyond an intimation that waste was used both in the engineering of roads and the OCWs.

225. In relation to the MRFs, HMRC recorded that Barr "have been required to construct these facilities in order to re-secure contracts with local authorities …". There was no mention of on-site engineering. Of course, as can be seen from Section B, the Overview of the Background, there was no such requirement but rather Barr chose to construct the MRFs as a marketing issue.

226. HMRC's notes recorded that KPMG advised Barr and that Barr was very knowledgeable and experienced in relation to Landfill Tax. Those officers noted that some materials were used for engineering purposes in the OCWs but they did not record the source or whether that was derived from the MRF.

227. The information furnished to HMRC by SEPA in early 2015, articulating their concerns that loads of mixed waste were incorrectly classified by Barr in respect of both environmental and tax legislation, caused HMRC to review the Landfill Tax returns in comparison with the environmental returns submitted to SEPA. In the period that was reviewed, there was a difference of 208,000 tonnes declared.

228. The returns serve different functions with the SEPA returns declaring all waste entering the Sites but the tax returns did not include tonnages relating to material used for non-taxable activity. The reconciliation of the returns in the November 2015 report showed that 69% of the material entering both sites was put to non-taxable activities.

229. HMRC formally opened an enquiry on 15 September 2015 and the review conclusion letter was issued on 18 January 2019.

230. Officers Doolan and Mitchell met with Barr and KPMG on 7 October 2015 to set out the scope of the enquiry. This was the first Landfill Tax case that Officer Doolan had handled so Officer Mitchell, who is not a technical adviser, purported to explain the technical "landscape" to him, albeit it was Officer Doolan who was Officer Mitchell's superior officer and ultimately instructed him to raise assessments.

231. It was agreed that Barr would commission the November 2015 report from KPMG. In addition Barr instructed KPMG to undertake an in-depth review of its documented processes and procedures for Landfill Tax. The Executive Summary of the November 2015 report reads:

> **Executive Summary**
>
> Based on the data provided, our checks and observations from time spent at BEL facilities, it is our view that the apparent difference between the tonnages reported on the LFT returns and those reported to SEPA has arisen as a direct result of the different reporting requirements of those two separate regimes …
>
> We are satisfied, that the differences in the tonnages declared for SEPA reporting and LFT reporting can be explained by differing definitions of "landfill" for these entirely separate reporting regimes. Section 8 refers.
>
> It is also our view that BEL has in place sufficiently robust processes and procedures to ensure the accurate reporting of LFT …
>
> We are also satisfied that the reduction in LFT declared over the last four years has been as a direct result of the increased volumes of waste being processed and recycled following BEL's £4.7m investment in two Material Recovery Facilities (MRFs).

232. Correspondence and a further meeting ensued. By that time, due to the volume of waste that was being utilised for site engineering, verification of that activity had become the principal focus of the investigation. In March 2016 Officer Berry joined the HMRC "team" to provide a "sector wide perspective".

233. Site visits were arranged for 23 May 2016 and they were attended by Officers Doolan and Mitchell with Barr and KPMG. There was a walk around Auchencarroch and a vehicle tour of Garlaff.

234. There was further correspondence and KPMG were requested to provide further information covering a three year period which they did. On 24 November 2016, at a meeting attended by Officers Berry and Doolan the latter summarised HMRC's view which was that the investigation had "…developed into three specific liability strands on the material used for restoration, haul roads and cell bunds where there were differences in the legal interpretation of the Prescribed Activities Order". Furthermore, Officer Doolan's clearly expressed view in regard to the OCWs was that the visits in May 2016 had established that the OCWs were not located on the perimeter of the landfill site and

that the materials being used to provide stability to the OCWs were not mineral in nature but processed general waste. KPMG disputed that.

235. It was agreed that KPMG would liaise with Officer Berry and prepare a "package" for him to present to his HMRC Environmental Taxes Policy ("Policy") colleagues on the issues of haul roads and cell walls.

236. At a further meeting on 8 December 2016, there was a presentation to HMRC explaining the operations on the Sites.

237. On 15 May 2017, in advance of a scheduled meeting on 24 May 2017, KPMG furnished Officer Berry with a file of what he described as "…useful information about the cell walls, haul roads and restoration activities". Mr Ramsey delivered a PowerPoint presentation to the meeting. In particular he explained the construction of the OCWs (see paragraphs 306 and 307 as to the now admitted inaccuracy in that presentation).

238. On 20 July 2017, Officer Berry received confirmation from HMRC colleagues that their view was that material utilised in the construction of the OCWs was in fact disposed of as waste.

239. He subsequently verbally confirmed to Officer Doolan that the "...material used on cell walls was a careful placement of waste" so Officer Doolan asked Officer Mitchell to issue notices of assessment and associated documentation to Barr.

240. The review conclusion letter confirmed the following assessments:-

(a) Assessment for £1,056,384 issued on 26 October 2017.

(b) Assessment for £1,385,424 issued on 26 January 2018.

(c) Assessment for £805,869 issued on 20 April 2018.

L Synopsis of Revenue Scotland's Enquiries

241. There was no formal handover from HMRC to Revenue Scotland. There was some information exchange checking the number of landfills registered with HMRC and some limited cross checking.

242. On 7 September 2015, Officer Hoey visited Garlaff with Officer Turner from SEPA. Officer Turner's role was to support Officer Hoey. Despite her job description as Head of Complex Tax which suggested significant tax knowledge, Officer Hoey had no background in tax and had only had very limited training on tax. In the course of the year prior to the introduction of SLfT she had only attended various lectures from lawyers explaining the legislation and the stages the legislation was at and various workshops to discuss implementation of the legislation. She was therefore, understandably, very reliant on those like Officer Turner who had extensive experience in relation to landfill, as opposed to tax. She conceded in cross-examination that "I would always seek advice before I make a conclusion".

243. Officer Turner prepared evidence, analysed NDA records and worked closely with her but the decisions were those of Officer Hoey. Mr Ghosh criticised Officer Hoey suggesting that her evidence was evasive. Certainly, she was defensive but we take the view that that was rooted in her lack of experience.

244. On 30 September 2015, Revenue Scotland issued a Notice of Enquiry under Section 85 RSTPA into the first quarter, being 1 April 2015 to 30 June 2015, of the 2015/16 SLfT return. The enquiry was opened due to concerns that more waste enters the Sites than is taxed. The SEPA waste data return tells SEPA how many tonnes of waste has been brought onto the Sites, has been treated, landfilled, recycled or sent off site. The SLfT tax returns, at that time, included no figures in the exempt column (column C). Barr had not recorded there the tonnages used for on-site engineering. Therefore on comparing the two there were perceived substantial differences.

245. In cross-examination, Officer Hoey conceded that although at workshops Revenue Scotland had explained that they expected materials used for exempt purposes to be disclosed in that column, any taxpayer reading the legislation and Revenue Scotland's own guidance would not have believed that that was required.

246. On 20 January 2016, Revenue Scotland issued a second Notice of Enquiry into the return for the following quarter and on the same basis.

247. They were very long running enquiries involving lengthy correspondence, numerous site visits and associated meetings. On 9 February 2018, KPMG resigned agency and Brodies LLP, the current agent, then took over agency.

248. On 31 July 2018, Officer Hoey issued a Closure Notice to the appellant in terms of Section 93 of RSTPA for the periods quarter 1 and quarter 2 of 2015/16. She also issued a Notice of Assessment to Barr in terms of Sections 98, 102 and 105 of RSTPA for the periods quarter 3 of 2015/16 to quarter 3 of 2016/17 for additional SLfT chargeable in respect of the filter cake and for periods quarter 3 of 2015/16 to quarter 4 of 2017/18 for under-declarations of SLfT relating to material which had been declared as exempt.

249. On 17 August 2018, Barr requested a review of the decisions. On 14 September 2018, Revenue Scotland provided Barr with its view of the matter and on 26 October 2018 furnished Barr with the conclusion of the review which was to uphold the decisions. The appeal to the Tribunal was lodged on 21 November 2018.

M Technical Reports

(a) Golder Associates (UK) Ltd's report dated 24 April 2008

250. This report ("the Golder Report") was commissioned by Barr to carry out a review of ambient odours around Garlaff. SEPA had served an enforcement notice and it was the second such notice. Golder had been provided with four earlier reports commissioned from others by Barr dating from October 2006 to November 2007. The analysis of one of those (the CLP report) referred to site visits on 24 and 31 October 2006 noting that action was being taken on the first visit to put in place a covering of "Between 300-600mm of clay" on a particular slope and that that had been completed by the second visit.

251. It was also noted that in implementing recommendations in one of them, in or about the beginning of 2007, Barr had adopted an operational procedure of "Sealing the sidewalls of the then operating cell with clay."

252. Both suggest that that had not previously been the case. Lastly, the report of a site visit on 26 March 2008 simply stated that works were in progress to place clay on slopes. There is no indication of quantities.

253. One of many conclusions of the Golder Report was that:

> "The primary mechanism for controlling landfill gases is containment and abstraction. The measures undertaken to date to cap and seal the waste slopes of Cell 1 Phase 2 are therefore an essential requirement for an effective odour control system".

254. Mr Ramsey said that it was his understanding that that was a reference to the cell walls.

(b) Wardell Armstrong's Materials Assessment Report

255. Wardell Armstrong were commissioned on 15 November 2016 to assess if the material in Zone B should be classified as "waste" or "engineering material" for the purpose of Landfill Tax. Barr commissioned the report because they wished clarification of the function of an OCW. The commission was triggered by Revenue Scotland's enquiry. Wardell Armstrong described their remit as being "…to examine if the materials used in the intermediate capping profile serves an engineering process". The intermediate capping is what Barr call the OCWs.

256. Wardell Armstrong visited the Sites the following week and in particular visited the MRFs. They described the construction of the cell walls with Zone A being a 1 metre thick layer of clay placed on the external flank of the site, Zone B being a 10 metre wide strip where clay and processed waste were mixed, and Zone C being the standard waste mass. The report explained the methodology for creating Zone B and described it as being approximately 50% clay and 50% processed waste. What the report did not confirm was the order in which the Zones A and B were constructed.

257. They were clear that Zone A operated as a leachate control albeit the compaction in Zone B was alleged to reduce the potential for leachate. Zone A also managed vermin and pest control. Their report focused on the functionality of the structure involving both Zones in relation to "gas, odour, leachate and litter control".

258. It also stated that "The combination of the placement of Zone A and Zone B materials significantly improves the stability of the waste body".

259. The report pointed out that where cells are constructed adjacent to each other, as we note most will be, the OCW is left *in situ* and acts as a barrier between the cells. The OCWs were described as "intercell bunds".

(c) SLR's Clay wall lining system assessment reports

260. SLR Consulting Limited ("SLR") had been commissioned (again because of the enquiry) to provide geotechnical consultancy support to review Barr's practice of "… developing a clay wall interim capping system".

261. Following their site visit on 23 September 2016 when they state that they had visually assessed the construction of the cell walls, on 14 October 2016, SLR wrote to Barr stating that:

> "We confirm our initial view that the installation of the cell wall, which comprises an outer clay layer with selected waste inner layer, provides an engineering function… We understand that this approach has been used by Barr for a number of years and was initially adopted due to the significant height of waste infill.
>
> The approach taken is similar to approaches seen on other landfill sites for the purposes detailed above".

262. SLR then produced "Stability Assessments" for Auchencarroch and Garlaff on 10 November 2016 and 21 November 2016 respectively.

263. The principal aim of the assessments was stated to be to "…provide Barr with reassurance that the clay wall lining system is a suitable interim capping system that fulfils the requirements of a landfill capping system".

264. Both reports stated that historically Barr had lined the outer face of the cells with *in situ* clay which served the function of a cap on an interim basis. The purpose of that system was being defined as being primarily to prevent windblown litter, reduce moisture ingress into the site, reduce egress of liquids, reduce oxygen ingress and reduce uncontrolled emissions of landfill gas. In addition it would act as an engineered formation to commence installation of the permanent capping system.

265. Leaving aside Mr Ramsey's approach to these reports, which we discuss elsewhere, we have two issues with these reports. Firstly, SLR did watch the construction of an OCW and clearly they did not see the type of OCW described by Mr Ramsey. They stated that: "The practice currently employed…" for the creation of the cell walls, and went on to describe what we have called Zone A as being "up to 500mm thick" and Zone B was "a minimum of 300mm thick" which may at times "increase". The maximum width that they analysed was 750mm. That is radically different. Their modelling was based on that.

266. They were not alone in their understanding of the size of Zone A. A month previously, on 17 October 2016 ("the October 2016 letter"), KPMG had written to Revenue Scotland stating that Zone A was "A thin (<500mm) layer of clay…" and that its function was a sealing layer to contain any leachate or gas.

267. Secondly, SLR stated that they assumed that the structure would be *in situ* for a maximum of 12 to 18 months whereas it is apparently actually two to three years.

268. These factors raise questions about consistency in the construction of the OCWs.

N The Contentious Issues

Introduction

269. As we indicate at paragraph 17 above, the jurisprudential landscape has changed significantly in the course of this appeal because of the decision in *Devon 3.* We do not know whether that decision will itself be appealed.

270. There are three contentious issues and they are all rooted in the use of materials for the MRFs in significant quantities, namely in:

(a) OCWs,
(b) Restoration, and
(c) Roads

Although we deal with each issue separately, the approach to them all is primarily as prescribed in *Devon 3.*

271. Given that a lot of the focus in the hearing was on functional use of the material, crucially, use is not determinative. Indeed, as Lord Justice Nugee said in *Devon 3,* at paragraph 80, the relevant statutory language says nothing about "use", a word which does not feature in any of the relevant provisions. He argues that it is a distraction to ask whether use was made of the waste. We agree, and on that basis we reject Mr Ghosh's key argument that there was "no intention to discard because there was an intention to use that material for something, an objective, a purpose".

272. Undoubtedly Barr did make extensive use of the material but the relevant question to ask is whether that use was sufficient to negate an intention to discard. There is nothing necessarily inconsistent about a person throwing something away but doing it in such a way as to make use of some of its properties for his own purposes.

273. It is not disputed that all of the material had been destined for landfill in the first instance if not used, but it is a heresy to say "once waste always waste" as Lady Rose said at paragraph 27 in *Devon 3*. On the other hand as Lady Rose said at paragraph 61: "… it is not helpful to treat 'retention' as an antonym of discard … It cannot be that any material that is retained … falls outside the tax".

274. Lady Rose cited with approval Barring J at paragraph 50 in *WRG* where he said that: "No factors which serve to indicate as a matter of fact whether material is being discarded by the person concerned should be excluded from consideration unless such an interpretation of the provision is unavoidable". That means that we should also consider the economic factors.

275. We were repeatedly told how important it was to find very detailed facts and, of course we agree, but we had considerable difficulty with some of the evidence.

High level observations on the evidence

276. The hallmark of this case, notwithstanding the many days in court and the very extensive written and oral evidence, was the lack of pertinent evidence spoken to by both parties.

277. This case, as most others, turns on the facts. One of the problems that we had was that very few of the witnesses for Revenue Scotland actually had direct knowledge of many facts. That was complicated by the fact that this was a new tax, albeit almost identical to Landfill Tax.

278. Mr McCartney's evidence was of no value. He had produced a statistical analysis of Barr's tax returns compared with other landfill operators in Scotland but he did not know the basis on which they had completed their returns or how they operated.

279. As can be seen from Section J, Officer Allan's evidence was irrelevant to this appeal.

280. Thankfully, Mr Young wisely decided not to call Mr Donald McGilvery whose witness statement addressed the nature of waste and re-use and landfill policy.

281. We mention these three witnesses specifically because the fact that Revenue Scotland even deemed it necessary to obtain those statements when none could be of any value, points to the general lack of focus by Revenue Scotland on relevant considerations. The issue for them and for the Tribunal is the taxability, or not, of the material and in the first instance the issue, and therefore the focus, should always have been on whether the material is discarded as waste.

282. Even after cross-examination, the decision maker, Officer Hoey, was still confirming that one of her primary considerations was that the materials used in the on-site engineering was not suitable. She confirmed that she had come to that conclusion based on advice from SEPA officers such as Officer Turner and her "general knowledge". Whilst we certainly accept that suitability is a major consideration in considering restoration, we also accept that, as Mr Ghosh repeatedly, and correctly, pointed out, suitability is a matter for SEPA and the planning authorities. SEPA have taken no action for more than a decade and they made regular announced and unannounced visits to the Sites over the years. There have been no breaches of planning consents.

283. As Mr Ghosh repeatedly elicited from the non-expert witnesses, a significant part of the evidence advanced by Revenue Scotland was opinion evidence by those who were not experts. As we pointed out in the course of the hearing, we agree with Mrs Justice Proudman in *HMRC v Sunico*[10] at paragraph 29 where she stated:

> "29. Accordingly, and in the absence of any expert evidence, much in this case turns upon my assessment of the documentary evidence in the light of the parties' respective analysis of it. As I have already noted, to the extent that the witnesses expressed their opinions on the documents they discussed I have discounted their evidence."

[10] [2013] EWHC 941 (CH)

284. One of the primary examples of that is Mr Lang from SEPA who advised Revenue Scotland and who produced two witness statements. He visited Garlaff on 22 and 23 September 2010 and Auchencarroch on 13 September 2007 and 31 May and 1 June 2012 to carry out in-depth audits of those sites. He did not visit the Sites after that but produced three memoranda analysing the Golders Report, the Wardell Armstrong report, the SLR reports and correspondence from KPMG. He also analysed photographs.

285. The first and most obvious point is that the MRF at Garlaff only became operational in July 2012 and that was after his last visit.

286. In this appeal we are concerned with the periods from 2015, so whilst Mr Lang's evidence is pertinent to earlier periods and to the construction of OCWs in the period 2007-2012, as he is not an expert, his opinion evidence does not assist with periods after 2015.

287. We were startled to find that although Mr Ramsey and Ms Milligan presented as being sure of their facts, as they should have been as it is their business, nevertheless the evidence that Barr produced in support was notably unhelpful to them in a number of respects.

288. One example is the evidence from SLR. Mr Ramsey was very clear in his witness statement that Barr had been building OCWs "…in the same way, using the same method since I started at Barr…We have not had issues with the stability of our cells". Beyond the fact that both HMRC and Revenue Scotland had instigated enquiries, it is therefore less than clear why he commissioned reports focused on stability and why SLR had obviously been furnished with erroneous data such as how long the cell remained open.

289. We also had considerable difficulty with understanding why Mr Ramsey, having commissioned the reports from SLR and Wardell Armstrong, did not point out the huge discrepancies in the assumptions that they had made. We can only assume that he was interested only in establishing that the OCWs had a functional use.

290. We have no reason to doubt SLR when they stated that they were describing "The practice currently employed", yet Barr should have realised that would raise questions. When Barr's own expert, Mr Hodges, disregarded their reports in his report and reverted to the stability risk assessment ("SRA") from 2003, that should have raised alarm bells.

291. In that regard one of the yawning gaps in Barr's evidence was the fact Mr Hodges noted that: "Unfortunately, I have not seen the appendix to the SRA to confirm whether the extent of engineered liner/cover that was modelled matches what I observed being built" albeit both he, and we, observed that the SRA predated the current OCWs. Nevertheless KPMG has repeatedly stated that the same approach has been taken over 20 years.

292. Another point arising from SLR, and another yawning gap, is that in their October 2016 letter, SLR referenced Barr's approach being taken on other sites. Barr knew that both Revenue Scotland and HMRC challenged that. It would have been sensible for Barr

to have obtained further evidence on that point unless, as seems probable to us, Barr knew that SLR were indeed talking about a much smaller and more conventional wall. In cross-examination Mr Ramsey conceded that he had produced no evidence that this design of OCW was used at other landfill sites in the UK. That is a surprising omission since he would have known from Revenue Scotland's witnesses' statements that none of the officers had ever seen such a design. In particular, Officer Berry who had dealt with hundreds of enquiries over the years, stated that he had never seen an OCW constructed with processed waste.

293. Both SLR and KPMG, at that time, believed the thickness of Zone A was less than 500mm. Wardell Armstrong's report weeks later stated that the thickness was 1 metre. The discrepancies in relation to Zone B at a minimum width of 300mm (SLR) and 10 metres (Wardell Armstrong) is simply jaw dropping and not explained away by the fact that SLR used tangential measurements, while Wardell Armstrong used horizontal measurements.

294. The final issue in relation to SLR is that in their October 2016 letter they stated that Barr had used OCWs for a number of years and that approach had been "initially adopted due to the significant height of waste infill". By contrast Mr Hodges had been led to believe that OCWs had been introduced as a solution for odour control. Both had taken instructions from Mr Ramsey.

295. Mr Hodges' first report described visiting Garlaff, having read the Wardell Armstrong report, and observing the construction of an outer cell wall. He very clearly stated[11] that Zone A had been constructed first and then Zone B was constructed next. He produced an annotated photograph showing precisely that. Later on in his report[12] he described Zone B being constructed first, then Zone C then Zone A. Both in examination-in-chief and in cross-examination he confirmed that the sequence was Zone B, Zone C then Zone A and that a photograph in the Bundle appeared to show that. He was not alone in being confused about the order in which the Zones were constructed.

296. Ultimately Mr Ramsey, having been recalled, confirmed that Zone B was constructed first, then Zone A then Zone C. The fact that there was such a level of confusion arises because there is no written specification and some of the many photographs produced purported to show different sequences of construction. That may have been due to the angles of the photographs but the confusion did not inspire confidence.

297. The filter cake is another example of the deficiencies in the evidence produced for Barr (see Section F).

298. Turning to expert witnesses, the major point about the expert witnesses is that Mr McMeekin had been instructed only in relation to the issue of OCWs whereas Mr Hodges had been instructed in relation to all of the matters under appeal, except the penalties and he had visited the Sites on two occasions. Mr McMeekin had not visited the Sites and relied entirely on documentary evidence including draft witness statements. He

[11] Paragraph 40
[12] Paragraphs 56-59

had asked for a site visit but, for reasons that are unknown, Revenue Scotland had decided not to facilitate that. That is a pity since clearly that might have assisted him.

299. Mr Young was scathing about Mr Hodges' evidence. Although we agree that his evidence did not help a great deal other than to understand, ultimately, how the OCWs were constructed in 2019, nevertheless we find that he was independent and that his primary report could be described as heavily caveated. That in itself was very helpful but also a concern because of all of the information that he could not access. We deal with those caveats when looking at the relevant issues themselves.

300. It is only fair to say that Mr McMeekin's report was also of limited assistance. Their joint report was particularly helpful in their findings as to the size of the OCWs.

(a) OCWs

301. It was argued that Mr Ramsey was a credible witness and that there had been no effective challenge to his evidence, so his evidence on the OCWs stood. We disagree. Firstly, Mr Young, in an understated manner, did challenge Mr Ramsey, albeit he did not put it to him that he was lying. Secondly, it is for the Tribunal to assess all of the evidence and decide on credibility.

302. It is argued for Barr that it was never put to Mr Ramsey, or Ms Milligan, in cross-examination that Barr intended to discard the material as waste. This is a Tribunal and not a civil court. In these proceedings from the outset, in their Statement of Case at paragraph 52, Revenue Scotland have made it explicit that at the heart of their case was the issue as to whether there was an intention to discard. Everyone present knew that at the first diet when Barr's evidence was heard, *Devon 2* had not been decided so the issue was intention to discard. That is why there was such a focus on what the material was used for and what function it served.

303. It was argued for Barr that factual evidence relating to periods that predate the accounting periods under assessment in these proceedings is "irrelevant". It is not and in fact we view it as being key to understanding the issues. It undoubtedly forms part of the "factors", referenced by Barring J in *WRG,* that should be considered.

304. We know from the notification of the IAs to HMRC in October 2010 that material deposited in IA4 was for the purpose of "Construction of outer landfill containment wall" and comprised "Aggregates, mineral clay, construction & demolition wastes, fines from trommeling of mixed construction and demolition waste loads". (The notification to Revenue Scotland in 2015 of the NDAs changed the underlined words to "processing of mixed waste loads". It did not make it clear that that included municipal waste.) We do not know if the waste in 2010 included municipal waste but have assumed not, since there was no MRF.

305. We do know that the method of construction certainly changed in 2012 with the introduction of the MRF at Garlaff.

306. Mr Ramsey's evidence was that the OCWs had always been built to a similar method and specification in terms of size and shape and that prior to the introduction of the MRFs those walls had been made almost entirely of clay but with some recovered

soil and rubble. Those walls were about 6-7 metres in width. In his evidence he said that the 6-7 metre clay wall was in use when he commenced with Barr in 2007 and that that design had been in place for approximately two years previously. However, we know from the Golder Report that that simply was not the case.

307. The first time that there was any suggestion that the OCWs before 2012 were made of clay and were 6-7 metres wide came in Mr Ramsey's witness statement dated 20 September 2019. It is very surprising that it was not even mentioned in the presentation to HMRC with KPMG in May 2017, when Mr Ramsey was endeavouring to explain the "on-site re-use of materials" and the saving of virgin clay. One of the slides he produced for that presentation stated that "If waste was not used in Zone B then Zone A would need to be much larger (11m thick instead of 1m) …". In cross-examination he had to admit that such a proposition could not be correct if previously a 6-7 metre clay wall had sufficed. By inference, if it was correct then there had been no 6-7 metre walls.

308. Furthermore, and tellingly, that presentation was made with KPMG who put their name to it. Mr Ramsey said in evidence that KPMG would have seen the 6-7 metre walls from 2009/10. We find it highly improbable that, if they had known that Barr were constructing 6-7 metre wide walls primarily from clay that they would not have made the point about such walls in the lengthy correspondence with both HMRC and Revenue Scotland when they were focusing on the potential saving of virgin clay. That would have been a very significant omission. Tellingly, in the October 2016 letter when describing Zone A as being <500mm of clay, they went on to say that if the material from the MRF was not used in Zone B "a much thicker layer of clay or other virgin material would have to be used to provide the structural stability in the cell". Patently they had not known about 6-7 metre wide walls. Mr Ramsey agreed that neither tax authority had been told about such OCWs.

309. There are other inconsistencies. As can be seen from our commentary on the Golder Report it seems that prior to October 2006, the walls of the operating cells were reported as not being "sealed" with clay and that by 2008 "clay placement" was complete on one slope and works were in progress to place clay on two other slopes. As we have noted there is no indication of quantities. However the use of the words "sealed" and "place" certainly does not suggest construction of a thick wall. Elsewhere it describes "works to cover the smooth geomembrane with clay". That is not a thick wall.

310. In his own November 2008 Report, Mr Ramsey describes waste materials utilised in cell development and distinguishes between use on the basal area and the flanks. That seems inconsistent with there being a 6-7 metre wide clay wall.

311. In his report Mr Hodges stated that Mr Ramsey had told him that "in the past" the OCW was primarily clay in a layer 6-7 metres wide. However, he went on to say later in the report that:

> "I do not know where the 6-7m Zone B … using site-won materials and small amounts of recovered soil was placed, and therefore cannot confirm where the current practice of mixing clay with processed waste in a wider Zone B started".

312. Mr Hodges' report is dated 24 October 2019 so is therefore after the compilation of Mr Ramsey's witness statement. At best, it is bizarre that Barr's own expert witness did not have anything like precise information.

313. In the course of the hearing I indicated that arithmetic was not my strong suit but even I have difficulty with Mr Ramsey's argument that the current construction of an OCW resulted in a saving of virgin clay. In the period 2012 until 2019, it was thought by everyone that the construction of the OCWs with a mixture of processed waste and clay was in a 50-50 proportion. It was alleged that that layer was 10 metres wide so 5 metres must have been clay and there was the external facing which was alleged to be 1 metre wide of clay. That makes 6 metres of clay and the previous OCW was allegedly almost 6 metres of clay. That would not justify an investment of more than £4.7 million on the MRFs. It simply does not make sense and is not credible.

314. In his second report and in oral evidence Mr Hodges referenced an aerial photograph from 2011 to which Mr Ramsey had referred in his oral evidence. In fairness to him he accepted that it was difficult to interpret photographs. However, firstly we consider his evidence on the photograph to be based on numerous assumptions which are untested. An example is that the compactor that he used as a point of reference for scale was assumed to be the model used in 2020. That seems to us to be a major assumption and there is no evidence to that effect although when Mr Ramsey referred to the photograph and compactor he said that it was approximately 9-9.5 metres long. Although a considerable amount of time was expended on theorising about the photograph, ultimately we did not find it helpful and specifically we do not find that it tells us anything about cell walls before 2012.

315. No credible explanation has been offered as to why those OCWs were allegedly 6-7 metres wide using an expensive and limited resource like clay. Mr Ramsey agreed that other materials were used to only a small extent. None of the experienced officers had seen such a wall anywhere. The clear evidence from both experts and from the officers was that the industry norm was, and is, a small clay zone placed directly onto the waste. Mr Hodges described it as "A sort of rule of thumb, a 1m Zone A is often used throughout the industry". Mr McMeekin stated that it would be expected to be 0.5 metre.

316. In *Devon 1* the Tribunal described the construction of a typical cell in an ordinary modern landfill site in paragraph 14. In particular, at paragraph 14.10 they stated:-

> "The sides of the wall are also engineered to minimise leakage, though less elaborately than the base. There may not be a plastic membrane or geo-synthetic clay liner extending all the way up the side walls, compacted clay instead providing the required degree of impermeability. Some protection is provided for the side walls by the layer of lightly compacted black bag waste …".

317. Mr Ramsey's only argument was that since no compactor was needed for the wall it could be smaller than the current size of wall but still <u>had</u> to be 6-7 metres wide to act as a "…proper physical barrier against a 50-tonne compactor or a dumptruck (sic) colliding with it at high speed". We do not accept that and it flies in the face of the industry norm.

318. In summary, we certainly do not accept Mr Ramsey's evidence that clay was used for at least two years before he joined Barr in 2007. Given the terms of the Golders

Report we find that a layer of clay started to be applied to the slopes or flanks of the waste from 2007. The only evidence that OCWs were 6-7 metres with a small amount of processed waste was from Mr Ramsey and we do not find that credible.

319. We accept that there was an OCW of some sort prior to 2012 and that there was an external layer of clay but on the balance of probabilities it was not 6-7 metres wide. It would probably have followed the industry norm.

320. It can be seen from Mr Ramsey's 2008 Report for KPMG that saving tax was undoubtedly a motive after the decision in *WRG* and the introduction of *PAO 09* and there was a significant economic imperative to maximise the use of eligible on-site engineering using processed waste. It was also a very attractive proposition for the customers and, of course, in particular the Local Authorities because of the impact on pricing since Barr adopted a pricing model reflecting the saving in tax. Clearly the decision to build the MRFs was predicated on that.

321. It has consistently been argued for Barr that one of the drivers for the MRFs was to reduce the consumption of clay. Mr Ramsey conceded that he had not produced, or even looked for, any internal documents supporting that argument. That is very odd, given the amount of money at stake in this matter, but leads to an inference that they do not exist.

322. We say that not only because of our findings in relation to the pre-2012 OCWs but also since we accept Mr McMeekin's finding that rather than reducing the amount of clay used, Barr's method of construction increased it.

323. What we do not have is any contemporaneous documentation whatsoever relating to the change in the method of construction of cell walls after 2012. Mr Ramsey's evidence was that the design of the walls from 2012 evolved from internal discussions in Barr (with input from an external consultant but in respect of whom no information has been provided). He stated that Barr simply believed that a much bigger structure would serve at least as good a function as the previous walls. No modelling or testing was done before the tax enquiries were opened.

324. He said in cross-examination that there would have been a gradual increase in the tonnage of waste used in OCWs starting in June or July 2012 into 2013 when higher volumes would have been utilised. There is no other evidence.

325. We do know that the OCWs are constructed by an excavator driver and a compactor driver working together. Barr has no written specification for the design and construction of the OCWs and relies on the experience and knowledge of its senior site operators. It is the design and perimeter of the cell that dictates where the OCWs are constructed.

326. We also know that at least some drivers are hired with equipment but we heard no evidence as to whether that was long or short term, what training they might have received or how they are supervised. Mr Hodges confirmed that he had seen no evidence of quality control.

327. Mr Hodges states in his report that:-

> "It is difficult to verify the quantities and materials used in the construction of the outer cell walls. I am not aware of any specific records being kept. It does not appear that the thickness of the layers are controlled by setting out levels or survey. I have seen no Construction Quality Assurance ("CQA") plans or reports for this construction activity. The proportion of selected waste to clay used in the mix for Zone B is approximate."

He would have expected any landfill operator to have kept records such as site diary notes or checklists but although he asked for those, none was provided.

328. He went on to say "I have insufficient information to comment on or verify the quantities of materials used as I have been asked …".

329. Unfortunately, as we have pointed out there are inconsistencies in the evidence in regard to the sequence in which the OCWs were constructed. We therefore set out here Mr Ramsey's account as to how they should have been constructed with comment as appropriate.

330. Once landfill in a cell reaches ground level, the first section of the OCW is constructed around the open edges of the cell (ie the outer edge of the cell) to a height of approximately 3 metres above the level of landfilled waste. This provides a containment barrier for waste disposal operations.

331. Waste is tipped, spread out and then compacted by a landfill compactor within the area defined by the OCW into a layer approximately 3 metres deep so that it is to the height of the cell wall on the open edges. The compactors weigh approximately 50 tonnes and therefore exert not inconsiderable force.

332. The next section of the OCW is then constructed which is again approximately 3 metres above the existing level of waste within the cell and the process is repeated.

333. The OCW itself is constructed by an excavator driver taking materials recovered from the processing of different waste streams in the MRF and mixing that with site-won clay and/or site-won soils. The description of the waste streams can be found in the section on the MRF but effectively it is by exclusion. The only materials that do not go into the OCWs are the bigger items of rubble, wood, metals and bigger plastics.

334. Since the output of the MRF is variable the three products of the MRF in different sizes and densities are mixed together and engineered by both the excavator and landfill compactor with a view to achieving a fairly consistent result.

335. At Auchencarroch that is then mixed with 15% site-won clay and 15% site-won soil and at Garlaff, where there is relatively little site-won soil, it is mixed with approximately 30% clay. For the avoidance of doubt, site-won materials are mainly virgin clay and soils dug out from various areas on each site.

336. Mr Hodges had asked for records as to the proportions of the resultant "mix" but there were none. He watched the construction of an OCW at Garlaff and his opinion was that it was "done on a fairly loose basis on the site". It was difficult to tell what the

proportions might be. He states that the only form of control that was exercised was visual inspection.

337. Once mixed it is formed into a layer which is approximately 0.5 metre deep. It is then compacted further to roughly 20% of its original height. The process is repeated until the structure is approximately 3 metres above the level of the waste. This creates a lip against which the next lift of waste can be tipped. A clay layer which is approximately 0.5 - 1 metre thick is applied by the excavator driver to the outside face of the OCW. This has the effect of sealing the outside face of the OCW to prevent leachate escape. It starts out with 0.5 metre and more is applied so theoretically it should become 1 metre thick. It is compacted. The process is repeated for each lift.

338. There should be a lip to contain the next lift. The higher the cell rises, the less area there is to work in and therefore the cell wall becomes less prominent at the highest point of the cell wall. The total height of the cell wall is determined by the height that the cell needs to achieve as stipulated by the restoration master plan (also known as a restoration management plan ("RMP")).

339. Barr have only been keeping records of site-won materials used in cell walls since September 2018 but the construction method has apparently remained constant so the ratio should be the same throughout the period of enquiry. Until those records were analysed it had been thought that the ratio of waste to clay or clay and site-won soil had been 50:50 based on visual examination. However, the waste compacts whereas the clay does not, so the more accurate assessment is the 70:30 ratio based on the records. We note that on a site visit to Garlaff on 25 January 2018 Officer Turner observed that the ratio of waste was significantly greater. Both he and Officer Hoey also noted that the width of Zone B was significantly greater than 10 metres. He thought it was approximately 30 metres wide and she said in excess of 20 metres.

340. Since the compactor operates on top of the cell wall and it is approximately 5 metres wide, the minimum wall width is approximately 10 metres and Mr Ramsey states that the average is currently 10-11 metres. Towards the top of the cell, the wall gets thinner because the working area of the cell closes down.

341. The construction of the wall is allegedly always kept at a level whereby it is higher than the waste within the void of the cell but we saw photographs that did not seem to demonstrate that.

342. It is not known what the width of Zone C, the untreated waste, is at Auchencarroch but Mr Hodges stated that he observed that at Garlaff, Zone C in the open cell was approximately 100 metres wide. He also stated that the typical waste depth would be 20 metres and the maximum slope height would be 40 metres.

343. We find that there is no clarity as to whether or to what extent the width of an OCW has consistently been 1 metre at Zone A and 10 metres at Zone B as has been suggested. Mr Ramsey's oral evidence was that Zone A is "usually between half a metre and one metre". As we have noted earlier, certainly in 2016, KPMG thought that Zone A was less than 500mm wide. Mr Hodges demonstrated to us at some length that whereas the wall could look smaller at the top of a cell, it might be twice the size at the bottom. We accept that and it fits with Officers Hoey and Turner's observations.

344. The complete absence of any relevant records does not assist. Looking at the evidence in the round we find that the minimum width of Zone B is 10 metres and it may very well be more than double that if not more. Zone A would be a maximum of 1 metre but very probably has frequently been up to or less than half of that.

345. As each later cell is filled, the OCW for the earlier cell becomes further buried under waste until the later cell is completely filled and the OCW of the earlier cell is subsumed by the landfill.

346. The OCW, being the combination of Zone A and Zone B, is claimed to perform a number of functions and containment of exposed waste above ground level, in our view it is obviously one, albeit it has not consistently been claimed as a function.

347. We accept that the OCW does provide a health and safety function in the sense that it is a barrier at the edge of a high face when the cell is say 30 or 40 metres above ground level. However, we had no evidence of risk assessments informing just what would be required to achieve that as opposed to what was built.

348. Other claimed functions include providing stability to waste mass in the cell and also to the wider landfill phase of the Sites, which are made up of a network of cells. However, Mr Hodges conceded in cross-examination that the OCW itself would not be needed for the bulk stability of the waste mass.

349. It was argued that the combination of Zones A and B acts as a physical barrier to the egress of leachate and landfill gas and the ingress of air and surface water during the operational phase of the cell, preventing the ingress of vermin and helping, in part, to minimise wind-blown litter. Mr Hodges was clear in cross-examination, and we agree, that Zone A was "crucial" in that it provides the barrier for vermin. As far as litter is concerned, however, Mr Hodges conceded that that was not entirely clear. At best he was equivocal and conceded that fencing, which is conventionally used, had benefits.

350. Although Barr treats Zones A and B as one entity, we are not constrained to do so when considering whether the material was intended to be discarded as waste. Both experts considered the combined structure but also looked at the functionality of the individual Zones.

351. Leachate and landfill gas are always problems for landfill sites and indeed, historically, had been a major problem at Garlaff. Barr monitors it on a day to day basis. They do no formal evaluations. Mr Hodges' approach was predicated on a belief that there had been 6-7 metre wide walls which had been used to control the leachate and gas and on that basis agreed that the key purpose of the OCW was containment of leachate and gas.

352. Both experts agree that Barr have gone to a lot of trouble and effort in the construction of the OCWs and that some engineering benefits such as gas and leachate control are gained from that composite structure.

353. It is of note that both experts thought that the size of the current wall is a matter of choice for Barr. It is not a necessity. Neither think that it needs to be as constructed in

order to achieve the claimed functionality. We agree. In particular we accept the following evidence:

(a) Mr Hodges was clear that the size of the OCWs "…is thicker and more complex than what might otherwise have been satisfactory" and was predicated by "...the practicalities of the plant and machinery they had available on the site to build it".

(b) Mr Hodges makes it clear that apart from odour control issues: "The other engineering benefits claimed are usually provided on other sites without the need for a Zone B like structure". He also conceded in cross-examination that even if there were perceived to be a need for a Zone B "a much narrower" Zone B would suffice.

(c) Mr McMeekin considers that the width of the wall is excessive and is the function of chosen methodology rather than of necessity. He saw no reason why Barr could not function like other landfill sites with clay applied to waste with no Zone B.

(d) Both experts agree that a different design of wall could be constructed using a different method that could have allowed it to be built to be smaller.

354. We find that the method of construction of the OCW was an operational choice for Barr.

Looking at this extensive fact finding exercise, was there an intention to discard the material used in Zone B as waste?

355. The material enters the Sites because the customer wishes to dispose of it. It is then Barr's decision as to what happens to it and in their recent written submission they state that title has passed to them. We see that as a neutral factor.

356. To a very large extent the material in the OCWs was very similar in nature to the waste in Zone C. The difference was separation by exclusion. The material was shredded and was then stored in the NDAs for a period. But is that segregation an indication of a use that negates an intention to discard? We find that segregation *per se* is not. It has to be looked at in the context of why it was segregated. It had to be stored because OCWs are not continuously being constructed.

357. We do not accept that the fact that Barr states, and always has stated, that it used the material and never intended to discard it means that there was no intention to discard.

358. As the Local Authority tender documentation makes clear, for Barr, saving landfill tax was a major economic driver for the construction of the OCWs in the way that they are built.

359. The facts relating to the OCWs are more complex than in *Devon 1* where waste was being used for regulatory requirements specified in guidance, management plans and CQAs. There was a need for material to be used to comply with those requirements.

Barr had no regulatory requirement for the OCWs and they have not specified the design in any of their management plans let alone anywhere else.

360. In particular, we note that although leachate and gas control was claimed as a function of the OCWs, OCWs were not included in the relevant LMPs for that. We did not accept Mr Ramsey's argument that something would only be added if it increased the risk since increasing risk would presumably be a last resort and would have to be assessed and tested. We accept that because Zone B is more compacted than Zone C that would slow the drainage of leachate but we also accept the argument that that creates its own risk since it is slower to move to the drainage system which is the whole object.

361. We find it inherently incredible that the major investment in the MRFs was made without a documented decision based on a business case. The absence of any such documentation when combined with the numerous other inconsistencies in the evidence to which we have pointed leads to the adverse inference that the intention was always to discard as waste.

362. The fact that the claimed benefits of the OCWs were never modelled or tested (before the tax enquiries) and there are no formal written designs, specifications, risk assessments or quality control procedures in place, supports the view that Barr did not intend to make use of the alleged properties of the waste but rather intended to discard it.

363. Both experts' opinions on the functions of, and need for, the OCWs point to an intention to discard.

364. The very large size of Zone B (even at its minimum) and the very high proportion of waste in it also points to an intention to discard.

365. Ultimately, we find that although the material was processed and placed with a degree of care in the OCW, which forms the perimeter of each cell, nevertheless Barr's intention was to discard it as waste. The OCWs are simply a mechanism for discarding it.

(b) Restoration

366. Restoration projects can only take place once a cell is capped. The last restoration projects carried out at Auchencarroch and Garlaff ended in January 2016 and June 2016 respectively.

367. Section 31(2) LTSA defines restoration as "… work, other than capping waste, which is required by a relevant instrument to be carried out to restore a landfill site to use on completion of waste disposal operations". Section 31(3) LTSA states that a planning permission and an authorisation are relevant instruments.

368. "An authorisation" is defined as an "authorisation under regulations under Section 18 of the Regulatory Reform (Scotland) Act 2014".[13] No such regulations have been made. It is not disputed that planning permissions, PPCs and CQAs are authorisations.

[13] Section 39 of the Landfill Tax (Scotland) Act 2014

369. In Revenue Scotland's guidance SLFT3003 – Restoration, restoration is described as:

> "… any work that the planning consent, permit or authorisation requires to be carried out after waste disposal operations ceased. The purpose of the works is to restore the site or a part of the site to a condition suitable for non-landfill use ….
>
> Restoration is **not** taxable **providing** it is carried out in accordance with an agreed restoration plan and it consists of no more material than is reasonably required to achieve the restoration purpose
> ...
>
> • ... Any waste used more than that agreed as necessary for restoration is likely to be taxable."

370. We also adopt the more extensive description of restoration contained in a generic letter sent to all operators of landfill in the SEPA West Region on 2 September 2016 wherein the Unit Manager for the landfill team stated *inter alia* as follows:-

> "Restoration is any work that the planning consent, permit or authorisation requires to be carried out after waste disposal operations on the landfill cease and capping to the required standard has been applied. The purpose of these works is to restore the site or a part of the site to a condition suitable for its proposed after-use and could involve design, initial landscaping works, soil spreading and aftercare …
>
> As you will be aware there is a requirement in your PPC Permit to ensure that all operations on your site are carried out in accordance with the Management Plan and any change(s) proposed by the Operator shall be submitted in writing to SEPA 14 days before the implementation of the proposed change. …
>
> The Restoration Management Plan should form part of the operator's Management Plan …".

371. That letter went on to intimate that the RMPs required *inter alia* to include specification of the types of material to be used for restoration. This letter was issued after the period with which we are concerned and there had been no such requirement previously.

372. Revenue Scotland's guidance SLfT3004 Notification about restoration dated 15 February 2015 required no details of materials but rather, amongst other details:

(a) "cross section drawings specifying maximum depths of restoration material to be applied",
(b) "an estimate of the total tonnage of material…You should deduct from this total any material on site that you have retained for this restoration and provide full details of how you have calculated the weight of the total of site restoration material", and
(c) "evidence to demonstrate why you require the notified tonnage".

373. That guidance confirmed that whilst Revenue Scotland would acknowledge the notification of restoration, that would not imply acceptance that the material is not taxable. The taxpayer is responsible for deciding whether material qualifies as not being taxable and "… must retain such evidence as is necessary to satisfy us that it was not taxable".

374. On 16 March 2015, Barr wrote to Revenue Scotland notifying their intention to continue to restore at Auchencarroch. The works had started in August 2010 and were expected to be complete by February 2016. Mr Ramsey enclosed "…copies of the relevant sections from planning permission DC/07/233/FUL and PPC permit PPC/W/20026, which stipulate the requirement for progressive restoration of the site. …details of calculations to estimate the total tonnage of material required for this restoration work and a cross-section diagram indicating the thicknesses of the restoration layers."

375. The calculation in that notification and the one for Garlaff in identical terms referenced depth, volume and tonnage for the total required for "topsoil material" and "sub-topsoil material" but we could trace no record of any deduction for material on site that had been retained for restoration. However, in his written Closing Submissions Mr Young said that Article 3(2)(a)(i) of the 2014 Order was no longer an issue in this appeal.

376. On 9 October 2015, Revenue Scotland replied to that notification stating "This approval does not imply acceptance that the material you are using is not taxable" and went on to quote from their guidance.

377. In its IAs, Barr first notified HMRC of restoration activities on the Sites in July 2010 and provided annual updates thereafter.

378. The intimation to Revenue Scotland of the NDAs included NDA6 and as can be seen from Section H(e) above, the notifications specified that the types of materials used for that purpose were "Sub-soils, fines, construction & demolition wastes, compost, compost-like output". As Officer Hoey pointed out, it did not explain that the fines would be from processing of mixed waste.

379. Planning permissions may stipulate the maximum restored height and contours for the Site but these are not stipulated in the planning permissions for Auchencarroch or Garlaff.

380. The RMP for each site is a map and it identifies the height and contours to which the site must be restored and the different areas of vegetation. The most recent iterations of these are those approved by West Dunbartonshire Council for Auchencarroch on 3 September 2008 and by East Ayrshire Council for Garlaff on 18 September 2002. Effectively, the RMP is part of the planning permission.

381. The planning permission for Auchencarroch deals with the removal of soil and subsoil at the outset of operations and specifies that "where possible" that should allow for restoration of a depth of not less than 0.9m and that "Soils to be imported to the site

shall share similar profile characteristics as the soil structure currently on site". The planning permission specified that restoration should be timely.

382. It provided that the restoration will be "initially to grassland to stabilise the soil restored on the capped surface of the landfill but ultimately to dry heath vegetation and grassland for pasture… In the longer term the surface water treatment lagoon and reed beds would be restored to wetland habitats".

383. The PPC provides that when the final cap is constructed, it will comprise "… soil or peat forming material cover greater than 1 metre or other suitable combination of materials as agreed in writing with SEPA". Nothing was ever agreed with SEPA.

384. In the section of the PPC dealing with restoration and aftercare it provides that "Restoration of landfilled areas shall proceed progressively as landfilling operations are completed within each cell, such that each cell is fully restored within 6 months of being capped" and that that shall be undertaken as detailed in the LMP. The relevant LMP stated at 5.3:

> "The final profile of the landfill will be graded to produce the approved pre-settlement surface profile and this will be designed to meet appropriate criteria including:
>
> - minimising visual intrusion and impact on the surrounding landscape;
> - shedding of surface water to reduce infiltration into the capping layer;
> - suitability for the after use of the site (grazing),
> - typical gradient of the landfill capping will be between 1 in 4 and 1 in 25."

385. It was agreed that there would be similar provisions for Garlaff.

386. As far as Garlaff is concerned, in terms of the planning permission granted by East Ayrshire Council on 18 September 2002, restoration is to be of "civic amenity site areas" and "the restoration of the remaining area of the site for agricultural or forestry or nature conservancy or natural and man-made heritage interpretation or other appropriate uses as approved by the Planning Authority." Mr Hodges noted that it is to be progressively restored to agricultural grassland with blocks of woodland and hedgerow.

387. We had a CQA plan for Garlaff dated November 2014 but none for Auchencarroch, when the MRF was operational, but it was agreed that that would be similar to the one for Garlaff which states:

> "3.1 The permanent capping system will comprise …
>
> - Restoration soils comprising:
> - A 700 mm thick sub-soil layer;
> - A 300 mm thick topsoil/soil forming material layer."

388. Revenue Scotland have consistently argued that only that type of material should be used and only to that depth. However, we accept Mr Hodges statement that that 1 metre depth is a minimum requirement and in order to guarantee achieving that, "up to 20% more was placed, according to industry guidance".

389. The CQA also states that restoration soils "comprising sub-soil and topsoil/soil forming material" would be used and "All restoration soils will be sourced from within the site".

390. Whilst Mr Ramsey agreed that those were the requirements that applied at the time of the permanent capping, he pointed out that any restoration that was needed later to counteract settlement was outwith the CQA remit. That was not challenged. Indeed the 2011 CQA for Auchencarroch supports that where it states:

> "1.4 Scope of Works
>
> Two elements of capping works will be completed comprising:
>
> - Permanent Capping to those areas which have reached agreed final pre-settlement contours…" (emphasis added)

391. Settlement results from degradation of the waste whilst maintaining drainage gradients towards the periphery of the landfill. The surface gradient is important to prevent the formation of ponds that could result in leachate generation. The July 2014 LMP for Auchencarroch included a predicted 15% settlement rate relative to the height of the entire cell which might be as high as 40 metres.

392. Landfill settlement can occur at any time and certainly can and does occur much later than six months after capping. This can result in differential settlement across the site, ie where different parts settle at different rates and at different times. Differential settlement can occur within a single cell.

393. Mr Ramsey's uncontested evidence was that the areas of the Sites that have lesser structural density are more susceptible to settlement. Those are the areas of the Sites furthest away from the cell walls. He stated that the materials used for restoration for settlement would be 60% site-won and 40% from the MRF.

394. The regulation of such restoration then falls within the planning permission and thus the RMP. As we have indicated elsewhere the aftercare period can last for 30 years or much longer.

395. There were produced in the Bundle two undated documents that were sent by Barr to SEPA in December 2016. The "Auchencarroch projected quantities for future restoration requirements" document indicated that it was anticipated that the sub-soil layer would be a minimum of 0.7 metre and the topsoil layer a minimum of 0.3 metre and then additional restoration to counteract the settlement would be an average of a further 2 metres. We note that as long ago as October 2012 in notifying the NDA at Auchencarroch, Mr Ramsey stated: "… the restoration layer depths required equates to 2 metres …". That seems to have been consistently the position and the notification to Revenue Scotland in March 2015 was in similar terms.

396. Mr Ramsey confirmed that that sort of level would be required for approximately 80-85% of the site. Pertinently it included a paragraph that stated:

"Materials used in sub-topsoil layer only include materials of negligible environmental impact and include:

Sub-soil (excavated on-site)
Clay (excavated on-site)
Recovered sub-soil (EWC 17 05 04)
Fines from processing of mixed wastes (EWC 19 12 09, 19 12 12)"

397. The document for Garlaff was in similar terms.

398. On cross-examination, it was put to Mr Ramsey that the LMP for Auchencarroch in July 2014 showed a settlement rate of 15%. Mr Ramsey's explanation was that the 15% was in relation to the entire height of the cell so the 2 metres indicated in the 2016 document is accurate. We accept that.

399. Revenue Scotland's witnesses argued, and indeed it was Revenue Scotland's case, that the restoration levels attributable to settlement were excessive. We did not find Officer Turner's evidence in relation to quantities used in restoration reliable and indeed he changed his mind on a number of points in terms of quantities.

400. Revenue Scotland also argued that apart from their general argument that the materials were unsuitable, the materials used for restoration after settlement were particularly unsuitable. They should have been the same type of materials as those prescribed for the initial restoration at the time of capping of the cell.

401. By contrast Mr Ramsey argued that the planning permissions required Barr to restore the Sites after settlement but did not place any restrictions on the way materials were used in restoration and nor do the PPCs.

402. Although inert material is required for restoration there has been no testing of materials. A visual inspection to ensure that the material looks like "relatively dry, loose soil" is done by the staff, there is no written specification. Barr relies on the experience of its staff.

403. Although Mr Ramsey stated in his supplementary witness statement that "We would not use shredded household or commercial waste in restoration or to construct roads…", that is not the case as Mr Young elicited in cross-examination. The fines used in restoration originated from, amongst other types of waste, that waste.

404. In fairness to Mr Ramsey, Officer Clothier had emailed him on 15 June 2017, stating "For clarity, I have seen no evidence that inappropriate fines material has been used for restoration purposes at either Garlaff or Auchencarroch".

405. However, that was in the context of an email expressing concern that on a site visit on 21 April 2016 to Garlaff (when restoration was being done) he and Officer Turner had expressed concern about "the visibly high quantity of putrescible material (food waste) seen in the pile of waste". The email stated that Barr would need to ensure suitability and arrange appropriate testing.

Was there an intention to discard the material as waste?

406. Given the very limited information we have about restoration this is not straightforward. One of Barr's problems is that contrary to Revenue Scotland's guidance SLfT3004 and their letter of 9 October 2015, Barr did not "retain such evidence as is necessary to satisfy" them that the material was not taxable. Not even Mr Hodges could get relevant information.

407. Possibly, but we do not know, that harks back to an issue arising in 2014. In the 2014 Report KPMG stated:

> "We understand that Barr has a ruling from HMRC confirming that soil like waste fines can be used for site restoration purposes and therefore be treated as outside the scope for LFT purposes. Under the new Rules, HMRC might well have withdrawn this agreement unless Barr were able to prove compliance with the transitional 15% LOI threshold from 1 April 2015."

408. When Mr Ramsey was asked about the "ruling", it transpired it was no such thing. He told the Tribunal that the acceptance by HMRC of the NDA notifications amounted to what he considered to be a ruling.

409. It is not, and nor is the equivalent acceptance by Revenue Scotland. Firstly, it is accepted that fines from construction and demolition waste which are inert are used in restoration by landfill operators. Secondly, there was no disclosure that these fines are from mixed waste. A ruling from Revenue Scotland or HMRC can only ever be on the basis of full disclosure.

410. We also have a problem with that explanation because it does not sit well with the rest of the 2014 Report. KPMG point out, both in the body of the report and in the Executive Summary that in relation to notification of IAs "…we note that HMRC does not appear to have acknowledged the notifications…". We do not find Mr Ramsey's argument credible. It leads to the inference that, as it was he who was corresponding with HMRC, he had told KPMG that there was such a ruling.

411. Many of the issues encountered with the OCWs also apply to restoration as of course the materials used for restoration are also used in the OCWs. There are no records of site-won materials and no as built records. Again, Mr Hodges' report is heavily caveated. Amongst his observations he stated:

(a) "I have not been able to estimate the relative quantities of material actually used in restoration … I am unaware of records being kept of soil depths placed, or the extent to which soils used had been derived from stockpiles of original soil, soil from mobile screen, or suitable fines fraction from MRF".

(b) He had asked for but not seen any documentary reference to any allowance for landfill gas pipework infrastructure.

(c) He had not seen the planning submission or full planning permission for Auchencarroch.

(d) He had not seen a soils balance for Garlaff so he could not comment on the shortfall of soil material. He pointed out what his experience told him about shortfalls of soil and concluded that he had no reason to suspect that any of those reasons would be an explanation for soil shortfalls at Garlaff.

(e) "It is not entirely clear to me what materials have been used for restoration at Garlaff".

(f) "I am therefore unable to give an opinion on the extent to which the materials used in the restoration have been proven to be suitable."

(g) Some other landfill operators have derived components for soil making material from trommel fines but that would create a poor quality sub-standard soil. The industry practice would be that such fines would be derived from construction waste. He expressed particular concern that Barr's trommel fines contained a putrescible and active waste stream so there was therefore an inherent risk that any fines fraction derived from it would be contaminated. No testing had been carried out and he confirmed that "care needs to be taken to ensure that any soil making material that is incorporated into the restoration is suitable for its final use as restoration soils and is contamination free."

412. On the positive side, he confirmed Mr Ramsey's evidence about the incidence of settlement. However we observe that at paragraph 148 of his report he stated that the restoration soil thicknesses are similar to the thicknesses of soils that existed at the site prior to landfilling. That is not consistent with the SQA plan for a 1 metre depth.

413. As we have indicated elsewhere, PCM was used for restoration in the period April to October 2015. Revenue Scotland sought to rely on a sample taken by Officer Allan on 22 June 2014 which did not match its description. We note that but it is before the period with which we are concerned and we do not know if it was an isolated incident and SEPA took no action. PCM did not pass through the MRF. It was not segregated.

414. As with the OCWs we do not find the issue of segregation, or not, determinative. As can be seen restoration happens intermittently.

415. We do not accept Revenue Scotland's argument that the restoration after settlement had to be done with specific types of material. It is clear that although the use of trommel fines from construction and demolition waste is sub-optimal it happens elsewhere and the terms topsoil and sub-soil refer to the location of the material.

416. We find that use of putrescible waste in the material is a significant factor. Revenue Scotland argue that such material is not suitable for use in restoration. The planning permissions for the Sites clearly referred to naturally occurring soils and the PPCs referred to "soil or peat forming material" and "soil cover" although both raise the prospect that "other suitable combinations of material" might be acceptable after approval by SEPA or a sufficient risk assessment. They argue it would be wholly inconsistent with the policy underpinning the legislation to differentiate between initial and subsequent restoration work in relation to the authorisation of the materials used.

417. We find that the fact that there have been no environmental breaches is not determinative.

418. Section 31 LSTA refers to restoration on completion of the landfill operations and does not differentiate in regard to the time of restoration. We agree that it is logical that the standard for what is suitable for initial restoration should be the same as that for restoration after settlement.

419. We also agree with Mr Hodges when he stated that "… the practice of using soils created from the processing of construction waste is standard across the UK".

420. Looking at the totality of the evidence, and for many of the reasons for our decision on the OCWs, but also specifically considering the use of putrescible material, we find that Barr did intend to discard the material as waste.

(c) *Roads*

421. We have set out our findings on the construction of the roads at Section H(c) above. Revenue Scotland originally argued that Barr had used unsuitable materials in the roads because they had used waste fines or waste materials. Mr Young conceded that it had not been established that unsuitable materials were used in the roads. Accordingly, the use of materials from the MRFs in the roads was not a disposal with an intention to discard as waste.

422. He also conceded that Revenue Scotland had failed to demonstrate either careless or deliberate conduct in relation to the roads and that therefore to the extent that the assessments and penalties related to the roads, the appeals should be allowed.

423. Roads remained an issue in only one regard and that relates to the Closure Notice part of the appeal. The only issue now is how one construes temporary roads compared to permanent roads.

424. In summary there is no definition of a temporary or permanent road in the legislation and Revenue Scotland relied entirely on their own guidance (which was based on HMRC's guidance). That is not the law, it is simply their view of the matter.

425. It is appropriate to look at Revenue Scotland's guidance SLfT3002 the relevant part of which reads:

Table of prescribed landfill activities

Description	**What is taxable**	**What is not taxable**
The use of material to create or maintain a temporary haul road	The use of material for the construction or maintenance of roads, either within the disposal area or adjacent to it. Such roads do not have engineered features (which may include kerbs or drains, and may be made from	The use of material for construction or maintenance of permanent site roads. These have engineered features (which may include kerbs or drains) and have a surface that is prepared and/or finished. Permanent

	crushed or re-used materials such as concrete or tarmac and may be eventually subsumed into the landfill site.	site roads are likely to have been constructed prior to the start of tipping operations on the site.

426. We accept Mr Hodges' clear evidence that "It is not possible to distinguish between permanent roads and temporary roads by particular features of construction. The key difference is their fitness for their intended purpose." He gave examples of having constructed roads that would be open across waste for ten years or more with kerbs and tarmac knowing that they would be dug up. By contrast both he, and we, are aware of permanent roads that do not have a tarmac or similar surface or kerbs.

427. The use of the words "may" and "likely" in the guidance reflect that.

428. As with the OCWs and restoration there is a lack of clarity as to location of the roads. Mr Hodges stated that "I have not been able to verify the linear extent of the claimed road network". That makes life very difficult and indeed Mr Young is quite correct in saying in his written submissions that there is a lack of information before the Tribunal which would enable it to determine whether some, or all, or none of the roads assessed by Revenue Scotland meet the statutory test.

429. What we can do is to say where we disagree with Revenue Scotland. Firstly, we do not accept that the word "haul" gives any assistance since permanent roads can be haul roads.

430. Secondly, we do not find that engineering features define what is or is not a temporary or permanent road. In particular, we accept Mr Hodges' statement that: "In time, the main function of these roads will change and with less heavy use can be finished off with a new wearing course suitable for its new purpose. The underlying sub-base material will have a permanent role in providing support for the new surface". The fact that the original sub-base remains permanently does not in itself make such a road permanent from the outset since permanent roads are constructed on "suitable fill or formation".

431. Lastly, we also find that a road that is "heightened" is a temporary road until such time as it becomes permanent. In deciding what is taxable or not we must look at the time of use of the materials. Until such a road reaches its final specification and height, the iterations before that would therefore be taxable.

O Decisions on the contentious issues

(a) *Taxable disposals*

432. As can be seen we have found that the use of the materials from the MRFs in the construction of the OCWs and in restoration were taxable disposals because the materials were disposed of with the intention to discard as waste by way of landfill at a landfill site. The appeals relating to those two issues are dismissed.

433. As we indicate at paragraph 418 above the appeal in relation to the roads under this heading succeeds.

(b) *Prescribed activities*

434. As we have pointed out at paragraph 41, Article 3(1)(g) of the 2014 Order is no longer an issue in this appeal.

435. The engineering activities relating to the construction of the OCWs, restoration and construction of roads are prescribed taxable activities within Article 3(2) of the 2014 Order because of a failure to comply with the requirement to give intimation or notification in terms of Section 31 LTSA (see Section E above and in particular see paragraphs 75 and 78).

436. The appeals in this regard in relation to the OCWs and restoration are dismissed. As we have pointed out at paragraph 424, as far as roads are concerned, there is a problem with a lack of cogent evidence.

437. Mr Young argued that we should give a decision in principle and that the parties should then seek to apply it. We did consider that but decided that that was not the best way forward.

438. We have decided that the assessment was timeous and competent, so, in principle the appeal falls to be dismissed but the burden of proof in regard to quantum lies with Barr. They have not discharged that burden of proof since even their expert was unable to come to a view on the extent of the permanent or temporary roads.

439. In those circumstances, having due regard to the overriding objective and in an endeavor to be fair, we reserve judgment on quantum in respect of the roads and remit the question of quantum to the parties for negotiation. The parties are directed to lodge either an agreed Statement on quantum or, alternatively, in the event that no agreement can be reached, further submissions and that by no later than 30 days after the expiry of the days for appeal.

(c) *Filter cake*

440. As we have indicated at Section F at paragraph 113, the assessment is confirmed and the appeal is therefore dismissed.

P Penalties

441. Barr argue that Revenue Scotland never suggested or put to Barr's witnesses that they were untruthful or had the intention to mislead Revenue Scotland in any way and nor was it put to them that they had been reckless as to the accuracy of the returns. However the factual issues were all explored in cross-examination. Barr and their counsel are well aware that if they did not succeed on the substantive issues then the issue of penalties, whether deliberate, careless or at all, followed.

442. SLfT is a self-assessed tax. It is not disputed that the assessment provisions in RSTPA are materially the same as the discovery assessment provisions in Section 29 Taxes Management Act 1970 ("TMA").

443. We agree with Mr Young that, by analogy with the discovery provisions in Section 29 TMA, the conduct conditions in Section 102 RSTPA as to whether there was a careless or deliberate inaccuracy can be retrospectively applied by the Tribunal so as to validate a discovery assessment.[14]

444. An assessment under Section 98 RSTPA may be made only where an insufficiency of tax was brought about "carelessly or deliberately" by the taxpayer (Section 102(1) RSTPA).

445. As far as the penalties assessment is concerned, Section 182(3)(a) RSTPA refers to a "deliberate inaccuracy" in an SLfT return or claim and Section 182(3)(b) applies where there is a "careless inaccuracy".

446. The Supreme Court in *HMRC v Tooth*[15] has recently opined on the meaning of a deliberate inaccuracy. The Court found at paragraph 39 that the Revenue would have to show that the taxpayer intended to bring about an insufficiency of tax and at paragraph 40 that the requisite "intentionality" is an intention to mislead in the sense of preventing "the Revenue from having a full understanding that the information relevant" to assessing the self-assessment.

447. The Court found at paragraphs 42-46 that an inaccuracy is deliberate if "… the maker of the statement knew it to be inaccurate or (perhaps) that he was reckless rather than merely careless or mistaken as to its accuracy" and "Parliament must have regarded 'deliberate inaccuracy' as conduct substantially more blameworthy" than carelessness.

448. At paragraph 47 the Court stated: "It may be convenient to encapsulate this conclusion by stating that, for there to be a deliberate inaccuracy in a document … there will have to be demonstrated an intention to mislead the Revenue on the part of the taxpayer as to the truth of the relevant statement or, perhaps, … reckless as to whether it would do so".

449. Officer Hoey's clear evidence in cross-examination was that she believed that a mistake could give rise to a penalty is simply wrong since it has to be as a result of a careless or deliberate act. Sadly, that lack of understanding is characteristic of Revenue Scotland's unfocussed approach in the course of what was a long enquiry on limited issues. It is regrettable that neither the view of the matter letter on penalties from Revenue Scotland dated 23 November 2017 (but erroneously so as it should have been 23 December 2017) nor Officer Hoey's Penalty Notice, explain why the reduction in penalties is 35%. Both simply reference that they had considered the timing, nature and extent of the disclosure being the issues stipulated in their guidance RRSTP3024 which was not produced to us or referenced.

[14] Hankinson v HMRC [2011] EWCA Civ 1566
[15] [2021] UK SC 17

450. There was no detail whatsoever. Given that the Tribunal has the power to vary any penalty imposed by RSTPA, at a minimum, Revenue Scotland should set out the parameters of their decision making on penalties, just as they should on the substantive issues. It makes the Tribunal's job more difficult and it does not assist Revenue Scotland. In conclusion, on this point, we observe as a point of reference given that we are bound to take into account UK jurisprudence, HMRC routinely explain in at least some detail their reductions in penalties. We commend that practice.

451. Before turning to reductions we must consider if penalties are appropriate at all and, if they are, on what basis.

452. The first issue is whether Officer Hoey had formed an honest and reasonable view that the assessment to SLfT was insufficient. Notwithstanding her lack of understanding of the law on penalties, we find that she did form such a view in terms of the law on SLfT. She decided that the behaviour on every issue was deliberate. Mr Young has conceded that, as far as temporary roads are concerned, it cannot be argued that the behaviour was deliberate albeit he argues that it was careless because they should have clarified in advance with Revenue Scotland how to approach the taxation on materials used on their roads. Of course, that part of the appeal has succeeded but for the reasons set out in the next paragraph, we would not have accepted that argument.

453. For the avoidance of doubt we reject the arguments of Revenue Scotland that Barr should have sought advice from Revenue Scotland, HMRC or SEPA about their on-site construction activities and that makes their conduct deliberate. Every taxpayer has the right to decide for themselves and/or take professional advice. Officer Hoey seemed to think that it was incumbent on a taxpayer to ask Revenue Scotland. Nonsense. That is a strong word but appropriate. For some taxpayers that might be a sensible approach, but as I pointed out in the course of the hearing, and have recorded in numerous decisions in the UK Tribunal over the years, the Revenue's view of the legislation is not always correct. It is simply a view.

454. At all times Barr have argued that they relied on the advice of KPMG and therefore no penalties could, or should be applied.

455. Undoubtedly Barr did employ KPMG and paid them large amounts of money but that is not the answer. As an example, it was argued for Barr, repeatedly, that KPMG had been paid £4,000 for advice on filter cake in 2012. They were but as we make explicit at Section F, clearly KPMG understood the law but because of what happened thereafter we can only assume that Barr did not give them accurate information. The *volte face* in KPMG conceding the point, correctly, in 2016, but then withdrawing that concession a year later, does not assist.

456. That is irrelevant to roads, restoration and OCWs but sets a context. We do not know what KPMG were asked in terms of the specific issues in this appeal. We are told that they "knew" what Barr were doing and effectively gave it their *imprimateur.*

457. We think not. Undoubtedly they were heavily involved but equally, quite apart from the filter cake, there were a number of areas where we found that, like Mr Hodges, KPMG did not have the relevant information. Yet Barr argue that they did. As can be

seen from paragraph 308 we find that they did not know about the alleged 6-7 metre clay walls.

458. Similarly as we have pointed out, the October 2016 letter (see paragraph 266) about the <500mm clay wall makes it clear that they did not know that Barr were allegedly building a bigger Zone A.

459. As we explain at paragraphs 407-410 it seems that KPMG had been misled about the potential ruling from HMRC.

460. There is another issue with a ruling in that in a conference call with KPMG on 25 January 2013, which was after the start of building the OCW at Garlaff, there was a discussion in relation to the taxation of OCWs in terms of where they were placed. The author of the note (a Barr employee) had written "… Test the argument that material sourced within site. Worth putting request to HMRC for Official ruling". Mr Ramsey's evidence was that KPMG approached HMRC and told him verbally that provided the OCW was situated at the edge of the disposal area it would be a non-taxable activity.

461. We find that incredible for a number of reasons. Firstly, as we indicate at paragraph 405, and as KPMG would have been fully aware, a ruling can only ever be given on the basis of full disclosure. Furthermore, it would always be in writing to be of any value. In any event, at that juncture, it was Mr Ramsey who was corresponding with HMRC.

462. Mr Ramsey did not ask KPMG to confirm the position in writing and he could not explain why nothing was documented in Barr's files. He confirmed that he had not asked KPMG to produce anything for this Tribunal.

463. Ms Milligan's evidence was that her knowledge of this issue was from discussions with Mr Ramsey. She confirmed that any note in relation to the phone call from KPMG would be held by Barr's finance section but no note had been found. Her oral evidence was that KPMG would not release internal documents and the only records obtained from KPMG "wasn't very organised". Whilst, of course, that is possible we view that with some scepticism. They are still the auditors. That does not fit well with Ms Milligan's statement.

464. Furthermore, Barr have been professionally advised throughout and reliance on KPMG has been the primary plank in their arguments on penalties for years. If KPMG did have documentation that was crucial to this case, and if they had refused to release it, Rule 17 of the First-tier Tribunal for Scotland Tax Chamber (Procedure) Regulations 2017 makes provision for citation of witnesses and orders to answer questions or produce documents. No application for disclosure has been made at any stage.

465. In summary we do not accept that:

(a) any ruling was sought or obtained by KPMG, or indeed Barr, from HMRC in respect of either OCWs or the use of trommel fines for restoration,

(b) KPMG were fully and accurately informed by Barr at all times,

(c) Barr made any real attempt to obtain from KPMG supporting evidence in relation to the specific advice given to Barr in relation to the particular issues in this appeal, and

(d) Barr, in doing what they did, acted on advice from KPMG specifically in regard to the extent of the construction of the OCWs and the restoration in using the material from the MRFs.

Q Decisions on Penalties

(a) Filter cake

466. We have made it clear at paragraph 110 in Section F that Barr's behaviour was deliberate and that for the reasons given in that Section. We find that Barr's behaviour in this regard is reprehensible and indeed reckless. Therefore we find that the imposition of a penalty for deliberate behaviour is entirely appropriate and see no reason for any reduction in terms of Sections 191 and 192 RSTPA. The appeal on that ground is dismissed.

(b) Prescribed activities

467. Although we have not seen KPMG's advice, looking at the correspondence, the one area where we find that, on the balance of probability, Barr did rely on KPMG, and later Brodies, was in relation to recording site-won materials (see Section E(b)). Accordingly, we find that the failings in terms of Section 30 LTSA and Regulation 12 of the 2015 Regulations were neither deliberate nor careless inaccuracies in term of Section 182(3) RSTPA. To that extent the appeal is upheld.

(c) Roads

468. If we are wrong in our decision on the penalty relating to prescribed activities, we must consider the penalty in relation to roads. Penalties are calculated on the basis of the potential lost revenue. We have reserved our decision on the quantum of the assessments so therefore we reserve our decision on the penalties which arise only in respect of the prescribed activities.

(d) *Taxable disposals*

469. For all the reasons set out above we find that Barr's behaviour was deliberate and indeed reckless in relation to both the OCWs and restoration. Although Mr Ramsey denied that the motivation was tax savings, for the reasons given, we find that that was a powerful motive as was the wish to be able to be competitively priced as a result. It was particularly reckless in that:

(a) As we have found Barr did not accept the advice in the conference call on 25 January 2013 to seek a ruling from HMRC, and

(b) Barr made the conscious decision to use processed waste in such large quantities in the OCWs (and treat as outwith the scope of tax) without taking basic steps to demonstrate that the OCWs needed to be that size to perform an engineering function.

We also consider it reckless to have used that processed waste (including putrescible waste) in such large quantities for restoration without testing or ensuring that the materials would be considered suitable.

470. We therefore confirm the penalty assessments on the basis of deliberate inaccuracy. The only remaining question is whether the reduction by Revenue Scotland of 35%, in respect of the penalties for misclassified waste in quarter 1 of 2015/16 is appropriate. As we have pointed out at paragraphs 449 and 450 we do not know how that percentage was arrived at.

471. We do know that Officer Hoey did consider whether there was evidence to warrant a special reduction in the penalties payable. The decision notice states: "I do not consider there to have been an event which is something out of the ordinary, uncommon, abnormal or unusual so as to warrant a reduction of the penalties on the basis of special circumstances".

472. She applied the correct legal test. Case law going back to *Clarks of Hove v Bakers' Union*[16] held (at page 1216) that in the context of "special circumstances" the word "special" means "something out of the ordinary, something uncommon". In *Crabtree v Hinchcliffe*[17] (at page 976) it was held that "'special' must mean unusual or uncommon – perhaps the nearest word to it in this context is 'abnormal'". In the same case, Viscount Dilhorne said (at page 983) "For circumstances to be special they must be exceptional, abnormal or unusual …".

473. The only exceptional circumstance in this matter is the disposal of the material as waste. We therefore find that there are no reasons for a reduction on the basis of special circumstances in terms of Section 191 RSTPA.

474. Finally, we did carefully consider whether the reduction at 35% reflected the timing, nature and extent of the disclosure by Barr. Admittedly, there was extensive disclosure over a prolonged period of time but it was undoubtedly prompted, repeatedly so.

475. In all these circumstances, we uphold Revenue Scotland's decision in respect of penalties relating to taxable disposals.

476. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has the right to apply for permission to appeal on a point of law pursuant to Rule 38 of the First-tier Tribunal for Scotland Tax Chamber (Procedure)

[16] [1978] 1 WLR 1207
[17] [1971] 3 All ER 967

Regulations 2017. In terms of Regulation 2(1) of the Scottish Tribunals (Time Limits) Regulations 2016, any such application must be received by this Tribunal within 30 days from the date this decision is sent to that party.

ANNE SCOTT
President

Previous release date: 5 October 2021

Amended pursuant to Rule 37 of the First-tier Tribunal for Scotland Tax Chamber (Procedure) Regulations 2017

ANNE SCOTT
President

Release date: 18 November 2021

Appendix

The Legislative background

1. Landfill Tax (Scotland) Act 2014

3 Charge to tax

(1) Tax is to be charged on a taxable disposal made in Scotland.

(2) A disposal is a taxable disposal if—

(a) it is a disposal of material as waste (see section 4),
(b) it is made by way of landfill (see section 5), and 29
(c) it is made at a landfill site (see section 12).

(3) For the purposes of subsection (2)(c), a disposal is made at a landfill site if the land on or under which it is made constitutes or falls within land which is a landfill site at the time of the disposal.

4 Disposal of material as waste

(1) A disposal of material is a disposal of it as waste if the person making the disposal does so with the intention of discarding the material.

(2) The fact that the person making the disposal or any other person could benefit from or make use of the material is irrelevant.

(3) Where a person makes a disposal on behalf of another person, for the purposes of subsections (1) and (2) the person on whose behalf the disposal is made is to be treated as making the disposal.

(4) The reference in subsection (3) to a disposal on behalf of another person includes references to a disposal—

(a) at the request of another person,
(b) in pursuance of a contract with another person.

5 Disposal by way of landfill

(1) A disposal of material is a disposal of it by way of landfill if—

(a) it is deposited on the surface of land or on a structure set into the surface, or
(b) it is deposited under the surface of land.

(2) Subsection (1) applies whether or not the material is placed in a container before it is deposited.

(3) Subsection (1)(b) applies whether the material—

(a) is covered with earth after it is deposited, or
(b) is deposited in a cavity (such as a cavern or mine).

(4) If material is deposited on the surface of land or on a structure set into the surface with a view to it being covered with earth, the disposal must be treated as made when the material is deposited and not when it is covered.

(5) The Scottish Ministers may, by order, make provision varying the meaning of the disposal of material by way of landfill.

(6) The order may modify any enactment (including this Act).

(7) In this section, "land" includes land covered by water where the land is above the low water mark of ordinary spring tides.

(8) In this section, "earth" includes similar matter (such as sand or rocks).

6 Prescribed landfill site activities to be treated as disposals

(1) The Scottish Ministers may, by order, prescribe a landfill site activity for the purposes of this section.

(2) A "landfill site activity" means any of the following descriptions of activity, or an activity that falls within any of the following descriptions—

(a) using or otherwise dealing with material at a landfill site,
(b) storing or otherwise having material at a landfill site.

(3) If a prescribed landfill site activity is carried out at a landfill site, the activity is to be treated—

(a) as a disposal of the material involved in the activity as waste,
(b) as a disposal of that material made by way of landfill, and
(c) as a disposal at the landfill site of that material.

(4) An order under this section may prescribe a landfill site activity by reference to conditions.

(5) Those conditions may, in particular, relate to either or both of the following—

(a) whether the landfill site activity is carried out in a designated area of a landfill site,
(b) whether there has been compliance with a requirement to give information relating to—

(i) the landfill site activity, or
(ii) the material involved in the landfill site activity,
including information relating to whether the activity is carried out in a designated area of a landfill site.

(6) In subsection (5), "designated area" means an area of a landfill site designated in accordance with—

(a) an order under this section, or
(b) regulations under section 30, 32 or 33.

(7) An order under this section may modify any enactment (including this Act).

12 Landfill sites and operators of landfill sites

(1) Land is a landfill site at a given time if at that time an authorisation is in force in relation to the land and authorises disposals on or under the land.

(2) The operator of a landfill site at a given time is the person who is at the time concerned the holder of the authorisation.

(3) Land is to be treated as a landfill site at a given time if at that time—

(a) disposals of material are made on or under the land,
(b) an authorisation is required in relation to those disposals, and
(c) no authorisation is in force.

(4) In determining for the purposes of subsection (3) whether an authorisation is required in relation to disposals of material, no account is to be taken of any prohibition or restriction under the Regulatory Reform (Scotland) Act 2014 that would prevent an authorisation being granted in relation to the disposal of the material by way of landfill.

13 Amount of tax

…(3) Where the material disposed of consists entirely of qualifying material, the amount of tax charged is to be found by multiplying the lower rate by the weight in tonnes of the material disposed of…

14 Qualifying material: special provisions

…(2) The Tax Authority may direct that where material is disposed of it must be—

(a) treated as qualifying material if it would in fact be such material but for a small quantity of non-qualifying material.
(b) treated as qualifying material of one category if it would in fact be such material but for a small quantity of qualifying material of another category.

(3) The Tax Authority may at the request of a person direct that where there is a disposal in respect of which the person is liable to pay tax the material disposed of is to be—

(a) treated as qualifying material if it would in fact be such material but for a small quantity of non-qualifying material,

(b) treated as qualifying material of one category if it would in fact be such material but for a small quantity of qualifying material of another category…

30 Information: material at landfill sites

(1)The Scottish Ministers may, by regulations, make provision about giving the Tax Authority information relating to material at a landfill site or part of a landfill site.

(2) The regulations may require a person to give information.

(3) The regulations may—

(a) require a person, or authorise [a designated officer] to require a person, to designate a part of a landfill site (a "non-disposal area"), and
(b) require material, or descriptions of material specified in the regulations, to be deposited in a non-disposal area.

(4) The regulations may make provision about information relating to what is done with material.

(5) Subsections (2) to (4) do not prejudice the generality of subsection (1).

31 Information: site restoration

(1) Before commencing restoration of all or part of a landfill site, the operator of the site must—

(a) notify the Tax Authority . . . that the restoration is to commence, and
(b) provide such other . . . information as the Tax Authority may require.

(2) In this section "restoration" means work, other than capping waste, which is required by a relevant instrument to be carried out to restore a landfill site to use on completion of waste disposal operations.

(3) The following are relevant instruments—

(a) a planning permission,
(b) an authorisation.

2. <u>Scottish Landfill Tax (Prescribed Landfill Site Activities) Order 2014</u>

3 Prescribed landfill site activities

(1) The following landfill site activities are prescribed for the purposes of section 6 of the LT(S) Act 2014 (prescribed landfill site activities to be treated as disposals)—

(a) the use of material to cover the disposal area during a short term cessation in landfill disposal activity;
(b) the use of material to create or maintain a temporary haul road;
(c) the use of material to create or maintain temporary hard standing;

(d) the use of material to create or maintain a cell bund;
(e) the use of material to create or maintain a temporary screening bund except where the material so used is naturally occurring material extracted from the landfill site in which the temporary screening bund is located;
(f) the temporary storage of ashes (including pulverised flue ash and furnace bottom ash);
(g) the use of material placed against the drainage layer or liner of the disposal area to prevent damage to that layer or liner; and
(h) any other landfill site activity to which paragraph (2) applies.

(2) This paragraph applies to an activity if—

(a) the activity is one which gives rise to a requirement—

(i) for notification or the giving of information under section 31 of the LT(S) Act 2014 (information: site restoration); or
(ii) imposed by Regulations under section 30 of the LT(S) Act 2014 (information: material at landfill sites) for the designation of a part of a landfill site as a non-disposal area or the giving of information or the maintenance of a record in respect of the area; and

(b) that requirement is not complied with.

(3) Paragraph (1) does not apply to any landfill site activity if, or to the extent that, it involves material that is or has been otherwise chargeable to Scottish landfill tax or exempted from that tax.

3. <u>Scottish Landfill Tax (Administration) Regulations 2015</u> ("2015 Regulations")

12 Non-disposal areas

(1) An officer of Revenue Scotland is authorised to require a person to designate a part of a landfill site (a "non-disposal area"), and a person must designate a non-disposal area if so required.

(2) Where material at a landfill site is not going to be disposed of as waste and Revenue Scotland considers, or one of its officers considers, there to be a risk to the collection of landfill tax—

(a) the material must be deposited in a non-disposal area; and
(b) a registrable person must give Revenue Scotland, or one of its officers, information and maintain a record in accordance with paragraph (4) below.

(3) A designation ceases to have effect if a notice in writing to that effect is given to a registrable person by Revenue Scotland.

(4) A registrable person must maintain a record in relation to the non-disposal area of the following information, and give this information to Revenue Scotland or to one of its officers if requested—

(a) the weight and description of all material deposited there;
(b) the intended destination or use of all such material and, where any material has been removed or used, the actual destination or use of that material;
(c) the weight and description of any such material sorted or removed.

4. Scottish Landfill Tax (Qualifying Material) Order 2015 ("the 2015 Order")

Qualifying material

2. — (1) Subject to paragraphs (3) and (4), the material listed in column 2 of the Schedule is qualifying material for the purposes of section 13(4) of the Landfill Tax (Scotland) Act 2014.

(4) Where the owner of the material immediately prior to the disposal and any operator of the landfill site at which the disposal is made are not the same person, material must not be treated as qualifying material unless it meets the relevant condition referred to in paragraph (5).

(5) The relevant condition is that a transfer note includes in relation to each type of material of which the disposal consists a description of the material which—

(a) accords with its description in column of the Schedule;
(b) accords with a description listed in a note to the schedule (other than by way of exclusion); or
(c) is some other accurate description.

SCHEDULE

Column 1 *Group*	*Column 2* *Description of material*	*Column 3* *Conditions*
6	Low activity inorganic compounds	

Notes

(6) Group 6 comprises only—

…(i) aluminium hydroxide;

5. Scottish Landfill Tax (Qualifying Material) Order 2016 ("the 2016 Order")

3. Qualifying material

(1) Subject to paragraphs (3) and (4), the material listed in column 2 of the Schedule is qualifying material for the purposes of section 13(4) of the Landfill Tax (Scotland) Act 2014.

(6) Where the owner of the material immediately prior to the disposal and any operator of the landfill site at which the disposal is made are not the same person, material must

not be treated as qualifying material unless it meets the relevant condition referred to in paragraph (5).

(7) The relevant condition is that a transfer note includes in relation to each type of material of which the disposal consists a description of the material which—

(d) accords with its description in column of the Schedule;
(e) accords with a description listed in a note to the schedule (other than by way of exclusion); or
(f) is some other accurate description.

Article 3

SCHEDULE

Column 1 *Group*	*Column 2* *Description of material*	*Column 3* *Conditions*
6	Low activity inorganic compounds	

Notes

(6) Group 6 comprises only—

… (i) aluminium hydroxide;

6. <u>Finance Act 1996</u>

40 Charge to tax

(1) Tax shall be charged on a taxable disposal.

(2) A disposal is a taxable disposal if-

(a) it is a disposal of material as waste,
(b) it is made by way of landfill,
(c) it is made at a landfill site, and
(d) it is made on or after 1st October 1996.

(3) For this purpose a disposal is made at a landfill site if th eland on or under which it is made constitutes or falls within land which is a landfill site at the time of the disposal.

64 Disposal of material as waste

(1) A disposal of material is a disposal of it as waste if the person making the disposal does so within the intention of discarding the material.

(2) The fact that the person making the disposal or any other person could benefit from or make use of the material is irrelevant.

(3) Where a person makes a disposal on behalf of another person, for the purposes of subsections (1) and (2) above the person on whose behalf the disposal is made shall be treated as making the disposal.

(4) The references in subsection (3) to a disposal on behalf of another person includes references to a disposal-

(a) at the request of another person,
(b) in pursuance of a contract with another person.

7 <u>Revenue Scotland and Tax Powers Act 2014</u>

2 Revenue Scotland

(1) There is established a body corporate to be known as Revenue Scotland.

(2) In Gaelic, Revenue Scotland is to be known as Teachd-a-steach Alba.

(3) Schedule 1 makes further provision about the membership, procedures and staffing of Revenue Scotland.

4 Delegation of functions by Revenue Scotland

(1) Revenue Scotland may delegate-

(a) any of its functions relating to land and buildings transaction tax to the Keeper of the Registers of Scotland ("the Keeper"),
(b) any of its functions relating to Scottish landfill tax to the Scottish Environment Protection Agency ("SEPA").

85 Notice of enquiry

(1) A designated officer may enquire into a tax return if subsection (2) has been complied with.

(2) Notice of the intention to make an enquiry must be given-

(a) to the person by whom or on whose behalf the return was made ("the relevant person"),
(b) before the end of the period of 3 years after the relevant date.

(3) The relevant date is-

(a) the filing date, if the return was made on or before that date, or
(b) the date on which the return was made, if the return was made after the filing date.

(4) A return that has been the subject of one notice under this section may not be the subject of another, except a notice given in consequence of an amendment of the return under section 83.

(5) A notice under this section is referred to as a "notice of enquiry".

93 Completion of enquiry

(1) An enquiry under section 85 is completed-
(a) when a designated officer informs the relevant person by a notice (a "closure notice") that the enquiry is complete and states the conclusions reached in the enquiry, or
(b) no closure notice having been given, 3 years after the relevant date.

(2) A closure notice must be given no later than 3 years after the relevant date.

(3) A closure notice must either-

(a) state that in the officer's opinion no amendment of the tax return is required, or
(b) make the amendments of the return required to give effect to the officer's conclusions.

(4) Where a closure notice is given which makes amendments of a return as mentioned in subsection (3)(b), section 83 does not apply.

(5) A closure notice takes effect when it is issued.

(6) The taxpayer must pay any amount, or additional amount, of tax chargeable as a result of an amendment made by a closure notice before the end of the period of 30 days beginning with the day on which the notice is given.

(7) In subsections (1) and (2) "relevant date" has the same meaning as in section 85.

98 Assessment where loss of tax

(1) This section applies if a designated officer comes to the view honestly and reasonably that-

(a) an amount of devolved tax that ought to have been assessed as tax chargeable on a person has not been assessed,
(b) an assessment of the tax chargeable on a person is or has become insufficient, or
(c) relief has been claimed or given that is or has become excessive.

(2) The designated officer may make an assessment of the amount, or additional amount, that ought in the officer's opinion to be charged in order to make good to the Crown the loss of tax.

102 Conditions for making Revenue Scotland assessments

(1) A Revenue Scotland assessment may be made only where the situation mentioned in section 98(1) or 99(1) was brought about carelessly or deliberately by-

(a) the taxpayer,
(b) a person acting on the taxpayer's behalf, or
(c) a person who was a partner of the taxpayer.

105 Assessment procedure

(1) Notice of a Revenue Scotland assessment must be served on the taxpayer.

(2) The notice must state-

(a) the tax due,
(b) the date on which the notice is issued,
(c) the date by which-
(i) the amount, or additional amount, of tax chargeable as a result of the assessment (as mentioned in section 98(2)), or
(ii) the amount of tax or interest repaid that ought not to have been (as mentioned in section 99(1)),
must be paid, and
(d) the time within which any review or appeal against the assessment must be requested.

(3) The-

(a) amount, or additional amount, of tax chargeable as a result of the assessment (as mentioned in section 98(2)), or
(b) amount of tax or interest repaid that ought not to have been (as mentioned in section 99(1)),

must be paid before the end of the period of 30 days beginning with the date on which the assessment is issued.

(4) After notice of the assessment has been served on the taxpayer, the assessment may not be altered except in accordance with the express provisions of this Part or of Part 5.

(5) Where a designated officer has decided to make an assessment to tax, and has taken all other decisions needed for arriving at the amount of the assessment, the officer may entrust to some other designated officer the responsibility for completing the assessment procedure, whether by means involving the use of a computer or otherwise, including responsibility for serving notice of the assessment.

182 Penalty for inaccuracy in taxpayer document

(1) A penalty is payable by a person ("P") where-

(a) P gives Revenue Scotland a document of a kind mentioned in the table below, and
(b) Conditions A and B below are met.

(2) Condition A is that the document contains an inaccuracy which amounts to, or leads to-

(a) an understatement of a liability to tax,
(b) a false or inflated statement of a loss, exemption or relief, or
(c) a false or inflated claim for relief or to repayment of tax.

(3) Condition B is that the inaccuracy was-

(a) deliberate on P's part ("a deliberate inaccuracy"), or
(b) careless on P's part ("a careless inaccuracy").

(4) An inaccuracy is careless if it is due to a failure by P to take reasonable care.

(5) An inaccuracy in a document given by P to Revenue Scotland, which was neither deliberate nor careless on P's part when the document was given, is to be treated as careless if P-

(a) discovered the inaccuracy at some later time, and
(b) did not take reasonable steps to inform Revenue Scotland.

(6) Where a document contains more than one inaccuracy, a penalty is payable for each inaccuracy.

	Tax	*Document*
2.	Scottish landfill tax	(c) Return under regulations made under section 25 of the LT(S) Act 2014. (d) Amended return under section 83 of this Act. (e) Claim under section 106, 107 or 108 of this Act …

(7) Section 183 applies in the case of a document falling within *item 1 or 2* [any item] of the table.

191 Special reduction in penalty under this Chapter [3]

(1) Revenue Scotland may reduce a penalty under this Chapter if it thinks it right to do so because of special circumstances.

(2) In subsection (1) "special circumstances" does not include-

(a) ability to pay, or
(b) the fact that a potential loss of revenue from one taxpayer is balanced by a potential 0ver-payment by another.

(3) In subsection (1) the reference to reducing a penalty includes a reference to-

(a) Remitting a penalty entirely,
(b) suspending a penalty, and
(c) agreeing a compromise in relation to proceedings for a penalty.

(4) In this section references to a penalty include references to any interest in relation to the penalty.

(5) The powers in this section also apply after a decision of a tribunal or a court in relation to the penalty.

192 Reduction in penalty under this Chapter [3] for disclosure

(1) Revenue Scotland may reduce a penalty under this Chapter where a person makes a qualifying disclosure.

(2) A "qualifying disclosure" means disclosure of-

(a) an inaccuracy,
(b) a supply of false information or withholding of information, or
(c) a failure to disclose an under-assessment.

(3) A person makes a qualifying disclosure by-

(a) telling Revenue Scotland about it,
(b) giving Revenue Scotland reasonable help in quantifying the inaccuracy, the inaccuracy attributable to the supply of false information or withholding of information, or the under-assessment, and
(c) allowing Revenue Scotland access to records for the purpose of ensuring that the inaccuracy, the inaccuracy attributable to the supply of false information or withholding of information, or the under-assessment is fully corrected.